*Chesapeake Bay Local Assistance Board*

# *Summary of Public Comments Regarding Proposed Regulation Amendments & Agency Response*
# *Public Comment Period: October 9, 2000 – December 8, 2000*

**General Note:** Some of the comments received were general in nature and/or more commentary on the program or programmatic issues, such as specific local situations, whereby the comments are not addressed specifically at the proposed regulation amendments. In such cases, the agency response will be noted as "acknowledged."

**Regulation Section/Topic** **Comment Text and Agency Responses**

*Administrative*

**Comment:** The Bay Act amendments should be enacted as soon as possible.

**Agency Response:** Acknowledged.

**Comment:** One commenter stated that local governments are the parties that have failed miserably to uphold their end of the "partnership" with the State.

**Agency Response:** Acknowledged.

*Clarity/Ease of Understanding*

**Comment:** A more uniform, "one size fits all" clarification or interpretation of the regulations may be an effective way to reduce the amount of confusion resulting from individual local ways of administering the regulations. More explicit clarifications would be better.

**Agency Response:** Acknowledged. The Board has endeavored to maintain enough flexibility in the regulations and program for local governments to be able to adapt the regulations to their unique settings and modes of operation. In that sense, the regulations are not constitute "one size fits all" program.

*Economic Impact*

**Comment:** Recommends that CBLAD resume grants to fund local staff positions in localities where the burden of implementing the CBPA and proposed amendments would be most demanding. This would enable successful implementation of the program.

**Agency Response:** Acknowledged.

**Comment:** Many other state and federal programs, laws and regulations now require things similar or identical to the Bay Act regulations, introducing redundancies, potential conflicts, and cost-inefficiencies. Concern that these amendments are redundant with the requirements of other state planning and water quality protection initiatives, such as C2K, Tributary Strategies, TMDL development, etc, which will raise costs. A study should be conducted of the Bay Act program to review redundancies with other programs and to evaluate real local funding needs.

**Agency Response:** Acknowledged. The Board is attempting to address this concern through this amendment process. In addition, there are studies being conducted to evaluate perceived redundancies of state programs.

**Comment:** An SWCD would like the free soil testing service now available to farmers also made available to homeowners.

**Agency Response:** Acknowledged.

**Comment:** Some localities note that the DPB EIA states there is little evidence that increased costs associated with compliance with these amendments will lead to improved water quality. The commenter disagrees with the DPB Economic Impact Analysis and believes waterfront properties will dramatically decrease in value. However, concern was expressed that the additional costs of implementing the proposed regulation amendments will fall primarily on local governments, with little evidence of improved water quality and no proposals to increase the level of State funding assistance. They believe the EIA fails to account for the costs localities will face defending against lawsuits over denial of variances, inverse condemnations, etc. The DPB EIA cites increased reporting requirements and new enforcement responsibilities as examples of increased local government costs due to these amendments, without a clear revenue source to pay for the additional local government staffs to implement and enforce the new requirements. They believe that State agencies such as the Department of Forestry and the Virginia Department of Health should share the burden of implementing some of these requirements. They believe it is not fair for localities to have to bear the burden and costs alone and that the Commonwealth needs to conduct an evaluation of the cumulative local funding requirements needed to meet voluntary and mandated water quality goals. They are concerned that developing land in accordance with the proposed regulation amendments will continue to increase the developer's costs, which are passed on to the homebuyer. They also believe the proposed amendments would reduce the amount of land available for development, leading to higher housing costs. They ask to be allowed to continue to protect the Bay to the greatest reasonable extent while balancing economic considerations and request the Board to find ways to minimize costs rather than raising them.

**Agency Response:** Acknowledged. The DPB report also implies that there is no evidence that improved water quality won't result. They point out how difficult economic analyses of such environmental programs are to conduct and derive strong conclusions one way or the other. The Board is attempting to find the proper balance between adequately protecting water quality and maintaining flexibility and reasonable costs.

**Comment:** One commenter considers himself a property rights person and doesn't appreciate a single thing CBLAD has done in Virginia up to now. He considers environmental protection and land use regulations as environmental communism and taking of people's land without compensation. A few other commenters shared the view that the Bay Act constitute a "taking."

**Agency Response:** Acknowledged. The Board has heard from legal experts that the regulations do not meet the legal test of a "taking."

**Comment:** One commenter views the proposed amendments to invalidate the grandfathering of lots platted prior to the regulations. He believes the Commonwealth should compensate land owners who would otherwise bear a disproportionate personal expense for protection of our natural resources, especially it their lands were platted prior to the Act or disclosure of the regulations was not clear.

**Agency Response:** The proposed regulation amendments do not invalidate the original grandfathering provision. It is continued using the same language.

**Comment:** One city noted a concern that the cumulative impacts of the proposed changes would have significant land use and fiscal impacts: discouraging redevelopment, limiting local drainage operations and water quality efforts, inducing sprawl, and increasing local administration costs and placing greater restrictions and costs on landowners. For example, the regulations will significantly increase local operating costs through additional monitoring and reporting requirements and new notification requirements (e.g., alternating drainfield annual notices to change valve over).

**Agency Response:** Acknowledged. Further changes are being proposed to increase flexibility for redevelopment and infill development, especially in designated Intensely Developed Areas (See 9 VAC 10-20-130.1). The alternating drainfield septic criteria are an option, not a requirement; therefore, a locality does not need to incur any additional costs by simply not making the option available.

**Comment:** One commenter provided examples of new economic incentive programs (state funded easement purchases, etc.) for protecting buffers.

**Agency Response:** Acknowledged.

**Comment:** Several commenters prefer the Board to defer action on the proposed amendments to allow for additional time for a full evaluation of the economic and environmental impacts.

**Agency Response:** Acknowledged. The Board has followed the procedures set forth in the Administrative Process Act pertaining to the conduct of this regulation amendment process, including the economic impact analysis by DPB.

**Comment:** Several commenters noted that the "partnership" of CBLAD with localities suffers from the lack of sufficient funding assistance and the Board's increasing regulatory posture. They urge the Board to provide ample resources to accomplish all regulation requirements.

**Agency Response:** Acknowledged.

*Enforcement*

**Comment:** Many commenters are alarmed at violations to the CBPA, especially developers in certain communities infringing on the required 100' buffer area, justified by the implementation of stormwater BMPs. The commenters have

observed the various ways people interpret the regulations and the misuse of "loopholes," and believes that if decision makers don't support the regulations, loophole allowances will persist and misinterpretations will go unchecked. They ask the Board to do the utmost to enforce the law and regulations. They want to see stricter enforcement by the Board and stiff fines for local violations of the Bay Act, including violations of the 100-foot buffer requirement. The believe the Board should hold local approval authorities accountable for abusing regulations. They believe CBLAD and the Attorney General's office should sue the localities that continue to violate the Board's intent regarding maintaining 100-foot buffers on new developments.

**Agency Response:** Acknowledged. The Board is attempting to tighten the buffer language to eliminate the noted "loopholes."

**Comment:** Some commenters felt that It is not clear that localities have the necessary enabling authority to enforce requirements on agriculture, forestry and septic systems. They want the Board to be sure the regulations provide clear responsibility and authority for local governments to ensure compliance with these regulations. They believe the Board needs to require localities to have sufficient staff to adequately and proactively enforce these requirements, suggesting the number could be based on the average number of building permits annually.

**Agency Response:** Acknowledged. The NOIRA for this amendment process did not set any objectives for establishment of requirements for adequate local staffing.

*Fairness/Equity*

**Comment:** One commenter stated that he considers road building to be unfairly exempt from the regulations, based on a polluting experience nearby.

**Agency Response:** Acknowledged.

**Comment:** A number of commenters object to imposing these regulations on Tidewater communities and not on localities in the western portion of the Bay basin, much less the rest of the State. They believe the regulations should apply equally to localities throughout the entire Bay basin, not just in Tidewater.

**Agency Response:** Acknowledged. The jurisdiction of the program is set in State law. Several legislative attempts have been made to expand the jurisdiction to the localities in the remainder of Virginia's bay basin, including one piece of pending legislation, but so far these attempts have been unsuccessful.

**Comment:** Numerous commenters noted that localities interpret the regulations in various ways and allow the misuse of "loopholes." They believe that if local decision makers don't support the regulations, misuse of loopholes will persist and misinterpretations will go unchecked.

**Agency Response:** Acknowledged.

**Comment:** One commenter believes that the rural, residential landowner bears more of the burden of this program than agricultural or forest land owners.

**Agency Response:** Acknowledged. The requirements applying to the different land uses are different, but not necessarily more or less burdensome.

*Flexibility & Equivalency*

**Comment:** Some commenters believe the proposed amendments are too rigid and appear to remove some of the existing flexibility to accommodate individual circumstances, particularly in rural areas. They state that the same "one size fits all" approach should not be imposed on small low-growth rural areas as is applied to urban areas. They contend that appropriate flexibility is necessary for citizens to be able to reasonably use and develop their land. They believe the regulatory changes should maximize the discretion of local officials to make appropriate judgments specific to each site considered for permitting. They consider rigid general requirements to not be as good as knowledgeable on-site judgments for specific cases. Alternatively, other commenters also stated that the proposed amendments represent a "one size fits all" approach with decreasing local flexibility to accommodate individual circumstances, but especially in *urbanized* areas. They view the regulations as most easily applied to rural areas where undisturbed open and forested land and shorelines remain. They believe applying them in the same way to urban areas with developed shorelines is difficult to implement and justify and may promote sprawl. They view this as a mentality that does not account for individual local government and site-specific differences, even though watershed-specific planning and implementation has gained widespread acceptance. They believe additional flexibility to accommodate local conditions and goals and improved water quality is warranted to ensure consistency with the commitments in the Chesapeake 2000 Agreement, nearly one-third of which apply directly to local government activities.

**Agency Response:** Acknowledged. There is considerable flexibility in the regulations, which are not a “one size fits all” solution. However, the regulations do provide for a “bottom line” of consistency from one locality to another. The Board’s counter-concern is that officials of some local governments have continually implemented incorrect interpretations of the regulations, even after receiving correct interpretations from the Board and agency, justifying these decisions as “appropriate judgements specific to each site considered . . . .”

**Comment:** In a still different slant on this issue, another commenter noted that local politics often defeats any latitude or discretion available in the regulations in dealing with varying site conditions, even though the regulations appear to allow for more flexibility. They believe that adding specific provisions of local approval authority as prerequisites can provide (1) more effective water quality protection and (2) assurance of appropriate flexibilities for landowners.

**Agency Response:** Acknowledged. It was not clear from the comments what kinds of “specific provisions of local approval authority” the commenter might consider appropriate. The Board is attempting through these amendments to clarify and expand local flexibility while clarifying the “bottom line” requirements.

**Comment:** One commenter doesn't view the proposed amendments as a "one size fits all solution," but rather believes the regulations maintain plenty of flexibility.

**Agency Response:** Acknowledged.

**Comment:** Another commenter believes the regulations should maintain flexibility for owners of small properties that are "grandfathered," since these are not the real problem; the real problem is large developments, heavy industry, farm runoff and storm drainage.

## *General Comments*

**Comment:** With the exception of specific expressed concerns, Chesterfield County supports the proposed regulation changes.

**Agency Response:** Acknowledged.

**Comment:** One commenter expressed an understanding of and support for the intent of the regulations, which is to "protect and improve the water quality of the Chesapeake Bay, its tributaries and other state waters by minimizing the effects of human activity upon these resources. This commenter applauds the Bay Act's intention to integrate land use planning with water quality protection, considering these amendments to affirm or reaffirm the real intent of the law and regulations and expressing the view that most of the proposed amendments are housekeeping in nature and cause little concern.

**Agency Response:** Acknowledged.

**Comment:** Another commenter stated that the Bay Act regulations are a helpful tool for proper and environmentally sensitive design for new developments, and it is important that the regulations assist in arresting the growing problems of suburban sprawl and the need for redevelopment and infill development within urban areas.

**Agency Response:** Acknowledged.

**Comment:** Still another commenter commended the Board for its efforts to clarify the original regulations and provide localities with more straightforward guidance and effective legal tools. This commenter noted that many of the proposed regulatory changes are consistent, at least in principle, with those in a report issued by Arlington County's appointed task force involved in the review of the County Bay Act Ordinance.

**Agency Response:** Acknowledged.

**Comment:** The proposed amendments address some of the problems with interpretation and compliance that have developed over the last ten years. Many commenters support all the proposed changes to the regulations, as well as the Bay Act program in general. One local government commenter doesn't view the proposed amendments as a "change" in the regulations, stating that "They haven't changed; they merely close loopholes that have been used for the last 10 years to avoid obeying the rules."

**Agency Response:** Acknowledged.

**Comment:** Another commenter stated that the proposed changes appear to be broad and substantive, and it is not clear why such broad changes are needed, since a sort of status quo and predictability has been achieved in implementation of local Bay Act programs in Northern Virginia. The commenter expressed concern that some of proposed amendments will upset that status quo and set the program back. Another commenter supports the way the Bay Act regulations have been implemented and enforced in Fairfax County and in the Northern Virginia area.

**Agency Response:** Acknowledged.

**Comment:** Another commenter stated that it is important for the law to be clear, and it must be obeyed if we are to have a healthy environment for the next generation.

**Agency Response:** Acknowledged.

**Comment:** A commenter stated that fertilizer from waterfront yards is also polluting nearby waters.

**Agency Response:** Acknowledged. This is one reason why the Board is trying to clarify and tighten up the buffer requirements.

**Comment:** A local official requested the Board to please allow local governments the right to use their authority to make land use decisions, and not allow the State to usurp the authority of locally elected officials.

**Agency Response:** Acknowledged. The purpose of the regulations is to continue to allow local officials to make land use decisions, but to do so within the parameters established by these regulations to assure that water quality is being consistently protected from the impacts of land uses and development throughout Tidewater.

**Comment:** One locality commented that local governments function better with clear goals and objectives. CBLAD should review its goals and objectives before requiring any further local government action. This commenter expects that considerable changes will need to be made to the advertised draft of the regulation amendments to clarify and make the amendments workable.

**Agency Response:** Acknowledged. The Board has had considerable stakeholder involvement in the preparation of these proposed amendments and consider their goals and objectives to be clear. Further changes will be considered in response to many of these comments, with the intent of further clarifying the requirements and making them workable.

**Comment:** The Chesapeake Bay Foundation commented that it is possible the regulation amendments could lead to more "sprawl" type of leapfrog development, which is known to have more harmful effects on water quality, transportation and quality of life. CBF agrees it is important that the regulations assist in arresting the growing problems of suburban sprawl and the need for redevelopment and in-fill development within urban areas.

**Agency Response:** Acknowledged.

**Comment:** VACO agrees with all the comments submitted by Fairfax County, Middlesex County and the Hampton Roads Planning District Commission.

**Agency Response:** Acknowledged.

**Comment:** One commenter stated support for programs that enhance the Bay while meeting the needs of industry.

**Agency Response:** Acknowledged.

**Comment:** A commenter said the Board should encourage ways to involve the private sector more in implementation of this program.

**Agency Response:** Acknowledged.

**Comment:** A commenter reflected on the experience in Chesapeake of addressing the permitting of the proposed Falls Creek development, being built on top of a swamp, which will be filled in and for which 50-foot buffers are proposed.

**Agency Response:** Acknowledged.

**Comment:** A commenter from Portsmouth stated that the City leaders and the builders believe that building imposing structures near the shoreline raises their value and price, thus the builders' profits and the tax revenues for the City. However, nobody profits if we destroy the natural resources that sustain life on earth.

**Agency Response:** Acknowledged.

**Comment:** A commenter provided examples of buffer benefits and alternative ways to design sites that are profitable as well as environmentally protective.

**Agency Response:** Acknowledged.

**Comment:** Some localities commented that CBLAD partners in implementing the Bay Act with the Health Dept, DOF, and the SWCDs, but they consider CBLAD to be neither active nor responsive. Localities are placed in the position of implementing requirements that fall under the purview of other State agencies, such as the Department of Agriculture and the Department of Health. They believe it is not clear that localities have the needed enabling authority.

**Agency Response:** Acknowledged. The Department has been working vigorously to improve the working relationship with the mentioned partner agencies and to be collectively more responsive. The enabling authority comes through the regulations from Section 10.1-2113, stating that the Board's authorities are "supplemental" to those of other agencies, as long as the Board's actions do not interfere with those other authorities.

**Comment:** One commenter states he gets upset when rules affecting people's property rights are changed for the worse, especially since he views that his County has been following the regulations as originally written.

**Agency Response:** Acknowledged.

**Comment:** Several localities commented that wherever the concepts of minimizing land disturbance, minimizing impervious cover, and preserving (or limiting the clearing of) existing vegetation appear, CBLAD needs to qualify the language by adding "to the extent determined practical by the local government."

**Agency Response:** CBLAD staff is reluctant to recommend this change, because this is one of the areas of the regulations that involves balancing the property owner's interests against local government expectations. However, since the local government has the power of approval over such plans, the local government actually has the final say regarding what is considered practicable, without the need for further language changes.

**Comment:** One County expressed specific concern about uncertainties regarding the removal of local prerogatives pertaining to how its shoreline is to be developed. The County feels that arbitrarily stiffening CBPA rules will serve as a deterrent to the orderly, planned and environmentally sensitive manner in which it conducts its land use policies.

**Agency Response:** Acknowledged. The comments were not clear as to why/how the locality perceived its prerogatives were being diminished.

**Comment:** The Virginia Municipal League concurred with the comments submitted by the Virginia Association of Counties, the Hampton Roads Planning District Commission, and the Northern Virginia Regional Commission. VML believes the regulation revisions were published for comment too soon, without sufficient regional meetings to discuss specific provisions of the proposal.

**Agency Response:** Acknowledged. The Board conducted eight months worth of meetings of a Regulatory Advisory Committee to arrive at the proposed amendment language. The Advisory Committee included numerous individuals who were represented local governments, both staff and elected officials representing both urban and rural localities.

### *Local Program Consistency*

**Comment:** One local government commented that localities not effectively enforcing the regulations should be forced to comply without adding more burdens to those already in compliance by making them amend their ordinances further.

**Agency Response:** Acknowledged.

**Comment:** A number of commenters stated that there needs to be more consistency between the language of the Bay Act (sic regulations) and local practices concerning the 100-foot Buffer.

**Agency Response:** Acknowledged.

**Comment:** A commenter noted support for the proposed process to review the local programs' implementation for consistency with the new regulations. This commenter recommends that CBLAD focus audit attention on local zoning changes that would encourage more intensive development along the shoreline.

**Agency Response:** Acknowledged.

### *Local Program Implementation Provisions*

**Comment:** A number of local governments object to any attempt to force program implementation through only the local zoning ordinance. They point out that many local programs are adopted as stand-alone ordinances, which have been operating effectively for many years and do not need to be changed.

**Agency Response:** Acknowledged. As noted later in this document, further changes will be recommended to the Board to clarify that stand-alone ordinances will continue to be acceptable.

**Comment:** Some commenters stated that other State agencies, such as the VDH and DOF, should take more responsibility for some of these requirements.

**Agency Response:** Acknowledged. However, these other agencies have no statutory responsibility to implement provisions of the Bay Act or associated regulations. Therefore, CBLAD works cooperatively with them as partners.

### *Monitoring Local Program Implementation*

**Comment:** Some commenters believe that staffing in the CBLAD office should be increased to be able to better monitor the clearing of buffer areas and any reductions in the width of buffers.

**Agency Response:** Acknowledged.

### *Plan of Development Review*

**Comment:** Because the legal review period for Erosion and Sediment Control plans is 45 days, it is suggested that the comment period for CBLAD be reduced to 30 days.

**Agency Response:** Acknowledged. The existing 90-day time limit is established in Section 10.1-2112 of the Bay Act.

While CBLAD is allowed 90 days, staff routinely completes reviews and provides comments within 14 days and rarely takes more than a month. Staff is continually sensitive to local deadlines for receiving comments and taking action on site plans.

**Comment:** CBLAD should review all shoreline permit applications just as VDOT, VDG&IF, DEQ and VIMS are required to do through the joint permit process.

**Agency Response:** Acknowledged. CBLAD staff are once again becoming involved in the joint permitting process.

### *Regulation Process/Public Participation*

**Comment:** A number of localities and some other organizations requested the Board to withdraw the proposed amendments for further consideration and discussion with stakeholders, and present them anew after more notice has been given to the public.

**Agency Response:** The Board had an extensive Advisory Committee process, involving representatives of all major stakeholder interests, prior to proposing the amendment language for public comment. Since the public comment period, a number of meetings have been held with various stakeholder groups to further discuss comments and concerns. This process is being conducted consistent with provisions of the Administrative Process Act and, therefore, staff does not consider it appropriate to recommend that the Board further delay the proceedings. It is possible that further changes recommended in response to these collective public comments will warrant conducting an additional public comment process anyway.

**Comment:** One commenter stated that for regulations such as this, that affect someone's use of their property, each affected landowner should be notified personally. Some owners don't live in Virginia and wouldn't see the normal notices.

**Agency Response:** While understanding the commenter's concern, doing what he proposes would be prohibitively expensive and time-consuming. The Board is following the requirements of the Administrative Process Act, which sets forth reasonable and achievable notification requirements.

### *Words and Terms*

**Comment:** Several commenters expressed a concern that, especially in Part IV, there are many terms (may, reasonable, practicable, maximize, best available technical advice, etc.) that are vague, and they question who will determine what these terms mean.

**Agency Response:** Acknowledged. These terms are clearly and consistently defined in standard dictionaries, and beyond those definitions the Board provides guidance to prevent potential confusion.

### *WQIA*

**Comment:** One commenter noted that CBLAD should provide a model for local government water quality impact assessments and not risk inconsistency due to each locality developing their own content and procedures.

**Agency Response:** Acknowledged. The Board has provided clear guidance pertaining to major and minor WQIAs. In light of that, staff believes the flexibility afforded in the regulations is appropriate.

## 9 VAC 10-20-40

### *Definitions In General*

**Comment:** One commenter stated support for the amended definitions, which should help ensure that there is consistent application of the regulations among the various local jurisdictions.

**Agency Response:** Acknowledged.

**Comment:** One County stated that a definition of "Riparian Forest Buffer" is needed.

**Agency Response:** The proposed amendment language including this term is being proposed to be deleted (see 9 VAC 10-20-50 below). Therefore, the definition will not be needed.

### *Agriculture*

**Comment:** A number of commenters want the Board to define the term(s) “agriculture” and/or “agricultural activities.” In a related comment, some others suggested including definitions of "land disturbing activity" and "land disturbance," since the language is not clear regarding agricultural land development. They believe that land clearing regulations for agricultural land uses should be further defined in terms of how the regulations address buffer minimums and no net increase in NPS pollution, and agricultural land use exemptions from erosion and sediment control should be clearly stated.

**Agency Response:** Agricultural activities are generally defined in section 9VAC10-20-120.9 and, therefore, a formal definition is not needed. An amendment has added “or lands otherwise defined as agricultural land by the local government.” CBLAD is continuously working with DCR to clarify what agricultural land disturbance activities are exempt form local E&S Control requirements. This topic also relates to the conversion of land from a forested use to an agricultural use, and is of particular interest to CBLAD when such conversions impact the 100-foot buffer. Currently, CBLAD has allowed such conversions within the 100-foot buffer if the landowner agrees to implement a soil and water quality conservation plan.

### *Redevelopment*

**Comment:** A number of commenters expressed concern that the revised redevelopment standards are impractical in highly urbanized areas and IDAs. For example, since redevelopment has been redefined to disallow expansion of imperviousness, a home being demolished and redeveloped in the RPA could not be added to, but the owner would have been allowed to expand the original structure. This does not seem fair. Disallowing increased imperviousness and encroachments will prevent infill and brownfield development along residential and industrial waterfronts and may promote sprawl. They recommend deleting new language and restoring the original language. Other commenters noted that the proposed definition of "redevelopment" should be revised to clarify whether "no increase in the amount of impervious cover" is meant to apply only to the RPA or to the entire property, or even to redevelopment sites in the RMA. If the former, then guidance should be provided about how to differentiate development from redevelopment in RMAs. They feel this new language would seem to preclude any additions to or expansion of existing nonconforming structures, and that CBLAD should consider current approaches as equivalent if they achieve generally equivalent results. At worst, they believe the proposed impervious cover limitation should be applied only to redevelopment activities within RPAs. Still

others felt the words “reasonable buildable area” are too vague; the intent needs to be clarified.

**Agency Resonse:** CBLAD staff will recommend that the Board restore the original definition of the term *redevelopment*.

**Text as initially recommended for change**:

*"Redevelopment"* means the process of developing land that is or has been previously developed *so that there is no increase in the amount of impervious cover and no further encroachment within the Resource Protection Area*.

**Text as now recommended for change**:

*"Redevelopment"* means the process of developing land that is or has been previously developed ~~*so that there is no increase in the amount of impervious cover and no further encroachment within the Resource Protection Area*~~.

*Shore or Shoreline*

**Comment:** One commenter supported the changes to the definitions of shoreline. Others commenters provided suggested changes to add clarity, such as defining it by its relationship to Mean High Water or some other widely accepted and clearly defined geographical benchmark. These suggestions included defining shoreline by its relationship to mean high water or some other widely accepted and clearly defined geographical benchmark. The Attorney General’s office offered the suggestion of defining “shore” as is done in Code Section 28.1-1302 to mean “that land between the mean low water and the mean high water line.” Alternatively, the Attorney General’s Office suggested that “shoreline” could be defined as “the mean high water line of tidal water bodies, and the usual (ordinary) high water line of nontidal water bodies.”

**Agency Response:** RPAs are currently defined as “sensitive lands at or near the shoreline” but shoreline is never defined in the current regulations. The definition for this term was added as recommended by commenters in several reviews and evaluations of the regulations. The term is intended to apply in the absence of other Resource Protection Area (RPA) features to provide a reference from which the point the 100-foot RPA buffer is to be measured. However, the proposed language could be interpreted in various ways. Therefore, it is important for the regulations to indicate the intended meaning. The proposed definition, while perceived as necessary for implementation of the regulation, is admittedly somewhat vague, still posing difficulty in determining where the shoreline is for tidal lands. In tidal areas, is this “interface” landward or seaward of the mean high tide line? How often would water have to cover part of a riverbank before it was considered “routinely” submerged? This is important because it affects the delineation of areas subject to these regulations. It may be costly to leave the determination of which lands are and are not subject to these rules to local interpretation of what it means for land to be “routinely submerged.” This could raise administrative costs at the local level and increase uncertainty for landowners.

Given the potential for interpretative confusion over the proposed language, staff will develop language to address the matter. One possibility is to address this as recommended by the Attorney General’s Office by defining “shoreline” as “the mean high water line of tidal water bodies, and the ordinary high water line of nontidal water bodies.” However, the designation criteria for RPAs (Section 9VAC10-20-80B) does not include the term “shoreline.” As an alternative to defining “shoreline”, language could be added to the RPA designation section of the Regulations to more clearly indicate

the Board's intent regarding from where the 100-foot RPA buffer is to be measured. For example, the first sentence of Section 9VAC10-20-80B.5 might read: "A buffer area not less than 100 feet in width located adjacent to and landward of the components listed in subdivisions 1 through 4 above, and along both sides of any tributary stream " . . . as measured from top of bank." Alternatively, the additional language could read: ". . . as measured from the ordinary high water mark . . . ." The Corps of Engineers defines the term "ordinary high water mark" to mean that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

Given the above discussion, the Department recommends that a definition of shoreline not be placed in the Regulations and that the problem with identifying the reference point for measuring the buffer be addressed in revisions to 9 VAC 10-20-80.B.5. Thus, the proposed definition should be deleted.

**Text as initially recommended for change**:

*"Shoreline"* means the line describing the interface between land that is continually or, in the case of tidal flows, routinely submerged under water and land that is not continually or routinely submerged.

**Text as now recommended for change**:

~~*"Shoreline"* means the line describing the interface between land that is continually or, in the case of tidal flows, routinely submerged under water and land that is not continually or routinely submerged.~~

*Silviculture*

**Comment:** A number of commenters want the Board to define the term(s) "silviculture" and/or "silvicultural activities" to discriminate between real silviculture and land development (clearing trees to build roads and houses).

**Agency Response:** CBLAD concurs. Staff recommends that the Board include the following definition of "silvicultural activities:"

**Text as now recommended for change**:

*"Silvicultural activities"* means forest management activities, including but not limited to the harvesting of timber, the construction of roads and trails for forest management purposes, and the preparation of property for reforestation that are conducted in accordance with the silvicultural best management practices developed and enforced by the State Forester pursuant to § 10.1-1105 of the Code of Virginia and are located on property defined as real estate devoted to forest use under § 58.1-3230 of the Code of Virginia.

*Subdivision-Scale SWM Facilities*

**Comment:** Several commenters recommended that the Board needs to define "subdivision and regional scale stormwater management facilities."

**Agency Response:** CBLAD staff is recommending further changes to 9 VAC 10-20-130.1.e (see below), where this terminology is located. These changes eliminate the use of this terminology and, therefore, no definition is needed.

*Tributary Stream*

**Comments:** The Department received numerous comments with regard to the proposed revision in the definition of tributary stream. The commenters revealed a wide range of opinions regarding the proposed change.

Several commenters expressed support for the changes in the definition that offer flexibility in application, including the 320-acre watershed provision. Some of the commenters indicated that the 320-acre watershed provides an objective, measurable criteria that would be less subject to pressure from developers or other officials. Some commenters contended that the 320-acre watershed threshold has not been scientifically justified. Some commenters expressed concern that the use of a 320-acre watershed size will limit future land development by increasing the land area subject to the RPA designation when taking into account the 100-buffer required adjacent to the perennial drainageway. One locality expressed concern that the 320-acre watershed size will necessarily include man-made drainage features in their locality, which would impact the use of the surrounding land by increasing the required 100-foot buffer area adjacent to these perennial streams. This locality also expressed that with respect to man-made drainage features, the definition does not take into account differences in topography, soils, amount of rainfall, etc.

While supporting the changes, one locality indicated that the USGS maps should only be used as an initial guide and suggested that reference to USGS maps be removed from the definition and be redefined as a tool for initial and general review for the presence of RPA. This locality recommended that the definition be amended to read as follows: “Any stream segment that has a drainage area of at least 320 acres (one-half square mile). All RPA determinations shall be based on site-specific field information. Local Governments may require or conduct more thorough investigations to accurately determine the perenniality of streams.” Another commenter who supports the 320-acre threshold over the use of the USGS maps, indicated that they knew of several cases where the USGS, at the request of developers, changed the solid line designation of streams so as to remove RPA protection from those stream segments. An urban locality expressed concern that approximately 25% of their small watersheds are less than the proposed 320 acres threshold and contain many streams that appear to be perennial based on site investigations (including some that don’t even appear on USGS maps). This locality’s concern is that the threshold could lead to confusion or even legal challenges to their RPA designations. This locality urged that localities be allowed to use the best information available in making delineation decisions, regardless of the size of the watershed.

Two organizations representing development interests recommended that a threshold of 640 acres be used instead of 320 acres. While several commenters recommended that the drainage area threshold should be less than 320 acres. One conservation organization recommended a drainage acreage threshold of 140 acres, based on a suggested threshold in a 1999 study by a northern Virginia consulting firm. One development organization indicated that determining

the extent of tributary streams can be a subjective matter and that this should be handled on a case-by-case basis. See the discussion under 9VAC 10-20-80.D and 9 VACA 10-20-105 for further information regarding designations and delineations.

**Agency Response:** Given the above comments, it is evident that the problems associated with this issue cannot be addressed simply through a definition change. Thus, CBLAD staff recommend that the definition of "tributary stream" be stricken, references to that term be stricken from the Regulations, and that the matter be addressed through criteria rather than a definition. Please see 9VAC 10-20-80.D and 9 VACA 10-20-105 (below) for related text changes.

**Text as initially recommended for change:**

*"Tributary stream"* means any perennial stream that is so depicted on the most recent U.s. Geological Survey 7 ½ minute topographic quadrangle map (scale 1:24,000), or any stream segment that has a drainage area of at least 320 acres (one-half square mile), or both. Alternatively, local governments may conduct more thorough investigations to accurately determine the perenniality of streams.

**Text as now recommended for change:**

~~*"Tributary stream"* means any perennial stream that is so depicted on the most recent U.s. Geological Survey 7 ½ minute topographic quadrangle map (scale 1:24,000), or any stream segment that has a drainage area of at least 320 acres (one-half square mile), or both. Alternatively, local governments may conduct more thorough investigations to accurately determine the perenniality of streams.~~

**9 VAC 10-20-50(vi)**

*Buffer*

**Comments:** One locality stated that this language is vague and needs to be clarified. They asked what is meant by "assurance" and, regarding the phrase "to the extent feasible," who gets to decide that, the locality or CBLAD? CBF and many other commenters support the additional language regarding buffer protection. However, many local governments, the building industry and numerous other commenters expressed concern about the added language pertaining to buffer goals. They felt that this new goal is a significant, unfounded expansion of local program responsibilities, implying more active management and public education about maintaining stream buffers, even along non-RPA streams. If the new language establishing the buffer goal is to be kept, it should be amended to apply, only where feasible, to "tributary" streams and "tidal shores" (two RPA components) or to "tributary" streams alone, rather than to all streams and shores. Also, the structure of the proposed text should be improved ("encourage and promote . . . Assurance . . . ." does not make sense). The new language about assuring vegetated buffers to the extent feasible is too vague. Who gets to decide what is feasible? What is meant by "assurance" and who must assure? Forested or other riparian buffers do not take into consideration topography or directives of other agencies, such as Shoreline Advisory Services that encourage grading banks, as opposed to buffers. Most of these commenters recommended that the Board delete this added goal, noting that

it is not considered flexible enough and is not included among the goals listed in the Act.

**Agency Response:** The addition linked the Bay Act Regulations to Virginia's Riparian Forest Buffer Initiative. Upon further review, the Department agrees that this addition creates unnecessary concern and confusion, and CBLAD staff recommends that it be removed.

**Text as initially recommended for change**:

Local governments shall develop measures (hereinafter called "local programs") necessary to comply with . . . . . (iv) reduction of existing pollution; ~~and~~ (v) promotion of water resource conservation in order to provide for the health, safety and welfare of the present and future citizens of the Commonwealth*; and (vi) assurance, to the extent feasible, that all streams and shorelines will be protected by a forested or other riparian buffer area*.

**Text as now recommended for change**:

Local governments shall develop measures (hereinafter called "local programs") necessary to comply with . . . . . (iv) reduction of existing pollution; ~~and~~ *and* (v) promotion of water resource conservation in order to provide for the health, safety and welfare of the present and future citizens of the Commonwealth~~*; and (vi) assurance, to the extent feasible, that all streams and shorelines will be protected by a forested or other riparian buffer area*~~.

**9 VAC 10-20-60**

*Local Program Implementation Provisions*

**Comment:** A few commenters felt that the deadlines for adopting items C through G should be maintained, not rescinded.

**Agency Response:** All 84 Tidewater Virginia localities have adopted their local programs, and therefore these deadlines no longer have any meaning. Therefore, CBLAD staff recommend that the deletion of these deadlines be left as proposed.

**9 VAC 10-20-60.D**

*Local Program Implementation Provisions*

**Comment:** Some local government commenters questioned whether this language assumes that the local Bay Act program must be implemented through the local zoning ordinance only, or whether stand-alone ordinances can still be used. By extension, they questioned whether the local CBPA map would have to be part of the zoning ordinance, which would require time-consuming processes to amend the map whenever site-specific refinements are made (essentially, rezoning). They object to this. Local stand-alone ordinances have been operating effectively for 10 years and do not need to be changed.

**Agency Response**: It was not the intent of CBLAD to prevent localities from continuing to have stand-alone Chesapeake Bay Preservation Area ordinances. To clarify this, staff recommends that the phrase "or such other ordinances as appropriate" be inserted.

**Text as initially recommended for change**:

~~B~~ D. ~~Local governments may exercise judgment in determining site specific boundaries of Chesapeake Bay Preservation Area components and in making determinations of the application of this chapter, based on more reliable or specific information gathered from actual field evaluations of the parcel, in accordance with plan of development requirements in Part V.~~ [Note: The stricken text is not relevant to the new subject matter. The stricken subject is re-addressed in new Section 10-20-105.] Local governments shall incorporate the criteria in this part into their comprehensive plans, zoning ordinances, subdivision ordinances, and such other police and zoning powers as may be appropriate, in accordance with §§ 10.1-2108 and 10.1-2111 of the Act and Parts V (VAC 10-20-170 et seq.), VI (9VAC 10-20-181 et seq.), and VII (9 VAC 10-20-211 et seq.) of this chapter. The criteria may be employed in conjunction with other planning and zoning concepts to protect the quality of state waters.

**Text as now recommended for change**:

[NOTE: Only the new language is cited:]
Local governments shall incorporate the*se* criteria ~~in this part~~ into their comprehensive plans, zoning ordinances, subdivision ordinances, *or such other ordinances as appropriate,* ~~and such other police and zoning powers as may be appropriate,~~ in accordance with §§ 10.1-2108 and 10.1-2111 of the Act and Parts V (VAC 10-20-170 et seq.), VI (9VAC 10-20-181 et seq.), and VII (9 VAC 10-20-211 et seq.) of this chapter. The criteria may be employed in conjunction with other planning and zoning concepts to protect the quality of state waters.

## 9 VAC 10-20-80

*Resource Protection Area*

**Comment:** Some commenters support proposed modification to the "other lands" provision for RPA designation because it clarifies that the authority to determine what "other lands" warrant inclusion as core RPA features ultimately rests with local governments.

**Agency Response:** Acknowledged. This support will be communicated to the Board.

## 9 VAC 10-20-80.B.2

*Resource Protection Area*

**Comment:** Although no changes were made to this section, two commenters requested that a specific definition be provided or that clear precise language replace the phrase ". . . connected by surface flow . . ." under item number 2 (nontidal wetlands) of the features to be included as RPAs. Citing the lack of definition and clarification, these comments indicated there are occasional conflicts when delineating RPAs on some sites and that RPA delineations cannot be consistent or equitable for landowners because of the subjective nature of the criteria. One commenter, a local

government, inquired whether it could provide its own definition for this term in the local ordinance if the regulations don't include a specific definition.

**CBLAD Response**: The term ". . . connected by surface flow . . ." is in the section of the regulations pertaining to the designation of Resource Protection Areas (RPAs). RPAs include: "Nontidal wetlands connected by surface flow and contiguous to tidal wetlands or tributary streams." For nontidal wetlands to be a required RPA element, both conditions (a. connected by surface flow and, b. contiguous to tidal wetlands or tributary streams) must be met. Chapter III of the Local Assistance Manual (Manual) and Information Bulletin (Bulletin) Number 6 address the intent of this section. The most difficulty with the interpretation of this language has arisen over situations where riparian wetlands continuously extend upstream along a perennial stream into the reaches of the stream where the stream flow is no longer perennial or where intermittent streams with riparian wetlands directly connect with a downstream perennial stream and riparian wetlands. The Manual and the Bulletin are clear that in both of these situations these are not mandatory RPAs but rather optional RPA areas. Because of the significant environmental function and value of these areas, localities are encouraged to protect such intermittent streams and wetlands as RPA features.

The Board's regulatory advisory committee considered various ways to clarify the intent of this language, as well as alternative language. However, it was clear that each of the alternatives considered presented problems for existing RPA designations or introduced other uncertainties. Therefore, the Advisory Committee agreed the language should be left as is, with localities seeking assistance from CBLAD when questions arise.

For the purposes of the Regulations, "surface flow" is to be interpreted literally as actual ground saturation or inundation when designating RPAs. The required hydrological condition must exist for a week or more during the growing season. In view of this background, CBLAD staff recommend no further changes.

## 9 VAC 10-20-80.B.5

*Resource Protection Area*

**Comment:** A number of commenters stated It is unfair that agriculture is allowed to modify the buffer, but development is not. They state that the law is about water quality protection, not land use regulation. They point out that equivalency language was put into the regulations to facilitate reasonable buffer encroachments, and they believe this language should be reinstated and that deleting this language decreases flexibility.

**Agency Response**: The agricultural industry successfully argued during the original regulation development process that the requirement to have a conservation plan developed would give the local, state and federal conservation agencies access to many farmers with whom they had not previously been able to work and that they would then be able to exercise their persuasive influence to convince the farmers to implement some or all aspects of these plans without having implementation required in the regulations. The requiremens for individual BMP or full plan implementation were reserved for those tracts where 50-foot and 75-foot modifications of the buffer, respectively, were allowed for production purposes. Calculations were performed by the USDA-Natural Resource Conservation Service at that time demonstrating that implementing even a single nutrient management or erosion control practice (BMP) on an entire field achieved greater pollution removal than the 100-foot buffer by itself. These agricultural practices are revisited, maintained, and or updated annually as part of the farm=s production plan, unlike many urban BMPs. Furthermore, there is substantial

anecdotal evidence that many farmers are, indeed, implementing substantial elements of their plans voluntarily, even without such a requirement. Therefore, CBLAD staff recommend no further changes in response to this comment.

### 9 VAC 10-20-80.C

*Resource Protection Area*

**Comment:** Some commenters noted that the language in subsection C is confusing. If this refers to the differences between mapped areas of identified resources (e.g. wetlands) versus on-the-ground determinations, they feel this should be clarified.

**Agency Response:**

**Text as initially recommended for change**:

*C. Designation of the components listed in subdivisions 1-4 of subsection B of this section shall not be subject to reduction unless based on reliable, site-specific information as provided for in 9 VAC 10-20-105 and subdivision 6 of 9 VAC 10-20-130.*

**Text as now recommended for change**:

*C. Designation of the components listed in subdivisions 1-4 of subsection B of this section shall not be subject to ~~reduction~~ modification unless based on reliable, site-specific information as provided for in 9 VAC 10-20-105 and subdivision 6 of 9 VAC 10-20-130.*

### 9 VAC 10-20-90

*Resource Management Area*

**Comment:** Some commented that vague, inexact language here and in other sections should be made more exact, to clarify meaning and prevent misinterpretations and abuses.

**Agency Response:** CBLAD staff are reluctant to propose further changes due to the fact that all 84 Tidewater localities have already designated their RMAs consistent with the existing language and have had these designations approved by the Board, indicating they are consistent with the Board's intentions.

### 9 VAC 10-20-90.B

*Resource Management Area*

**Comment:** The Chesapeake Bay Foundation suggested that designating floodplains, highly erodible soils, including steep slopes, highly permeable soils and nontidal wetlands not included in the RPA should be mandatory RMA elements (9VAC 10-20—90B) and suggested the following change in language to reflect this: ". . . *and where mapping resources indicate the presence of the~~se~~ land types listed in items 1. through 4. below contiguous to the Resource Protection Area, ~~should~~ shall be included in designation of Resource Management Areas . . .*"

**Agency Response:** CBLAD staff consider it appropriate for localities to have greater discretion regarding their RMA

designations and, therefore, recommend no further changes in response to this comment. Besides, as noted above, all 84 Tidewater localities have already designated their RMAs consistent with the existing language and have had these designations approved by the Board, indicating they are consistent with the Board's intentions.

**9 VAC 10-20-90.C**

*Resource Management Area*

**Comments:** Some commenters supported the proposed clarifying language about RMA designations, although one felt that subsections 1 and 2 could be consolidated. However, there was agreement that these revisions should not mandate changes to existing approved local RMAs. A number of commenters urged additional protection for non-RPA tributaries, since there is no doubt that disturbed headwaters contribute to NPS pollution during storm events. In particular, historic tributaries that have been filled in or altered should be included as RMAs, since they frequently flood or revert back to their original state and, thus, deserve special protection.

**Agency Response:** The Board's intention in this subsection is to add the operative language of its long-standing RMA designation policy to the regulations. With that in mind, CBLAD staff is adding further or more stringent requirements that have not had the extent of public input involved in the original development of this policy language, or otherwise change the original meaning.

**9 VAC 10-20-90.C.1**

*Resource Management Area*

**Comment:** One commenter recommended that the Board change "available mapping resources" to "most current and exact mapping resources" or specify GIS maps. Furthermore, it was recommended that for clarity and more legal enforceability, the word "should" here and throughout the regulations should be changed to either "shall" (required) or "may" (permissive/optional/discretionary), as appropriate per the Board's intent.

**Agency Response:** The Board's intention in this subsection is to add the operative language of its long-standing RMA designation policy to the regulations. With that in mind, CBLAD staff is adding further or more stringent requirements that have not had the extent of public input involved in the original development of this policy language, or otherwise change the original meaning.

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**9 VAC 10-20-90.C.1.d**

*Resource Management Area*

**Comment:** One commenter requested that the Board delete this subsection, which addresses areas served by piped or channelized stormwater drainage systems. (NOTE: The commenter was under the mistaken impression that this language would require expansion of currently designated RMAs, at considerable local expense).

**Agency Response:** The Board's intention in this subsection is to add the operative language of its long-standing RMA designation policy to the regulations. With that in mind, CBLAD staff is adding further or more stringent requirements that have not had the extent of public input involved in the original development of this policy language, or otherwise change

the original meaning.

**9 VAC 10-20-90.C.2**

*Resource Management Area*

**Comments:** One locality requested that the Board clarify what "only portions" of a locality means. Some commenters recommended that the words "should", "will", and "may" be changed to "shall."

**Agency Response:** The Board's intention in this subsection is to add the operative language of its long-standing RMA designation policy to the regulations. With that in mind, CBLAD staff is adding further or more stringent requirements that have not had the extent of public input involved in the original development of this policy language, or otherwise change the original meaning.

**9 VAC 10-20-90.C.2.d**

*Resource Management Area*

**Comment:** One commenter (same as above re: 9 VAC 10-20-90.C.1.d) requested that the Board delete this subsection, which addresses areas served by piped or channelized stormwater drainage systems. (NOTE: The commenter was under the mistaken impression that this language would require expansion of currently designated RMAs, at considerable local expense).

**Agency Response:** The Board's intention in this subsection is to add the operative language of its long-standing RMA designation policy to the regulations. With that in mind, CBLAD staff is adding further or more stringent requirements that have not had the extent of public input involved in the original development of this policy language, or otherwise change the original meaning.

**9 VAC 10-20-90.C.4**

*Resource Management Area*

**Comment:** One regional planning commission said it's unreasonable that a local government would need to demonstrate how it has achieved significant water quality protection if it has utilized the criteria presented in the Regulations for designation of RMAs, suggesting that this calls into question whether the criteria supplied in the Regulations are valid measures of water quality protection. Two localities posed the question: if RMA designation is in part discretionary, and if it is not the intent of the Act to require all areas to be designated, then why should the local government be required to explain its rationale for excluding certain areas as RMA? This locality suggested that if the area is not required by the Act to be classified as RMA, that this in itself is sufficient justification or rationale not to designate it as such. Concern was expressed as to how a locality would go about demonstrating that significant water quality protection within an RMA is achieved and urged CBLAD to provide guidelines for making such demonstrations. Some expressed concern as to whether the new language will apply to those localities that have already designated RMAs. A few localities consider it unreasonable to be required to demonstrate how a locality will achieve significant water quality protection through the RMA designation process. Furthermore, they question whether the requirement to demonstrate how significant water quality protection will be achieved through RMA designation apply to localities that have already designated RMAs. They question why localities must explain the rationale for their RMA designations if it is not the Board's intent to require local

governments to include all lands in their jurisdictions. They perceive that the criteria supplied in the regulations are not valid measures of water quality protection.

**Agency Response:** This is a moot point because, as was noted above, all 84 Tidewater localities have already designated their RMAs consistent with the existing language and have had these designations approved by the Board, indicating they are consistent with the Board's intentions. Therefore, they have already provided all the justification that the Board would consider necessary. The intent of this new language is simply to confirm existing policy, not to require further designations or redesignations.

**Comment: Several c**ommenters felt that this provision is mandatory and, therefore, that "expect" should become "shall".

**Agency Response:** CBLAD staff concurs, recognizing that the proposed revision does not change the Board's original intent. Staff will recommend this change to the Board.

**Text as initially recommended for change:**

9 VAC 10-90.C.4 *The board will expect local governments to demonstrate how significant water quality protection will be achieved within designated Resource Management Areas, as well as by each local program as a whole, and to explain the rationale for excluding eligible Resource Management Area components that are not designated.*

**Text as now recommended for change**:

9 VAC 10-90.C.4 ~~*The board will expect*~~ *Local governments* ~~*to*~~ *shall demonstrate how significant water quality protection will be achieved within designated Resource Management Areas, as well as by each local program as a whole, and to explain the rationale for excluding eligible Resource Management Area components that are not designated*.

## 9 VAC 10-20-90.C.5

*Resource Management Area*

**Comments:** The Northern Virginia Regional Commission generally supports the clarifying language regarding the evaluation of land categories and establishing RMAs. Another organization supporting the additional RMA language suggested that localities will be better able to manage activities that are adjacent to or near the sensitive lands of the RPA i.e., floodplains, erodible and permeable soils, and the like.

**Agency Response**: Acknowledged. CBLAD staff will communicate this to the Board.

**Comment:** It was recommended that Section 1 and 2 of 9VAC10-20-90C be consolidated, which pertains to the type of land categories to consider for RMA designation where limited or no mapping resources exist within a jurisdiction.

**Agency Response:** The Board's intention in this subsection is to add the operative language of its long-standing RMA designation policy to the regulations. With that in mind, CBLAD staff is adding further or more stringent requirements that

have not had the extent of public input involved in the original development of this policy language, or otherwise change the original meaning.

**Comments:** Another commenter suggested that this requirement in conjunction with the allowance of adoption of the Department of Conservation and Recreation stormwater management criteria moves localities closer to a mandatory stormwater management program. An organization representing development interests suggested that the addition of RMA categories such as developable land, areas targeted for redevelopment and areas served by piped or channelized stormwater drainage systems, which provide no treatment of stormwater discharges, would significantly expand the reach of RMAs and effectively makes the program applicable to entire localities. This organization pointed out that this is inconsistent with the language in the Regulations stating that it is not the intent of CBLAD to require localities to designate their entire locality as an RMA urged CBLAD to re-evaluate the addition of these categories. Another organization indicated that the jurisdiction-wide RMA designation is by far the most appropriate designation and many of the CBPA jurisdictions have chosen to incorporate the valuable provisions of the RMA criteria everywhere within their borders. Without explanation one locality requested that Sections 9VAC10-20-90C 1d and 2d be deleted ("Areas served by piped or channelized stormwater drainage systems which provide no treatment of stormwater discharges").

**Agency Response:** This language is intended to provide clarification of requirements for designating Resource Management Areas (RMAs), consistent with the board's Guidance Policy Paper entitled "Board Determination of Consistency Regarding Local Designation of RMA," dated July 24, 1991. This policy was developed to clarify the Board's intent where mapping revealed little or none of the listed RMA land types or where mapping was insufficient or non-existent. It was also issued to address some early local RMA designation proposals that were, in the Board's opinion, unreasonably small- so small that applying the performance criteria would be very difficult or likely to result in insignificant protection of water quality. It is important to note that every local RMA designation since July 1991 has been subjected to the criteria in this Board policy and has conformed acceptably. Therefore, concerns about the amendment forcing further changes or expansions of existing local RMA designation are groundless. The Board's 1993-94 Regulation Study Committee strongly urged that since the criteria in the policy were being applied to the review of local RMA designation, the policy language should be amended into the regulations. This will be especially important should Tidewater localities choose to modify their RMA designations, or should a non-Tidewater locality choose to adopt a Bay Act program.

This Section specifies what land areas (in the jurisdictions subject to these rules) are to be included in the RMAs. Section B lists certain land types that "shall be considered for inclusion" in the RMA, and new language specifies that, if any of these land types are found adjacent to the RPA, then they must be included in the RMA. This change clarifies the language of the regulation to make it more clearly consistent with the actual practice. The indicated land types are chosen because of their close connection with the quality of adjacent waters.

**Comment:** Others noted that while it is appropriate for the Board to clarify that it does not expect jurisdiction-wide RMA designations, the Board should not discourage nor preclude such local designations. CBF expressed a concern that this language implies the Board does not favor the local designation of jurisdiction-wide RMAs. They consider jurisdiction-wide designation to be best and urge the Board to strike this language or add an endorsement of them.

**Agency Response:** Section 90-C.5 helpfully clarifies that localities are not required to place all lands in their jurisdictions in the preservation areas. However, this should not preclude localities from doing so if such a choice is perceived to be in the best interest of the locality. Section105 explicitly allows localities to deviate from the area designations in this part if actual field evaluations provide sufficient information to justify alternative area designations. This gives localities the opportunity to fine-tune area designations to local conditions once the information is available to justify the change. Not only is this flexibility valuable in its own right, but it has the added advantage of giving localities and potential applicants incentive to develop information that will be valuable for better managing land-use and water quality in the Bay region. CBLAD staff recognizes that incorporating the proposed change would not be inconsistent with the Board's intent in the original RMA policy language.

**Text as initially recommended for change:**

*5. It is not the intent of the board, nor is it the intent of the Act or this chapter, to require that local governments designate all lands within their jurisdiction as Chesapeake Bay Preservation Areas. The extent of the Resource Management Area designation should always be based on the prevalence and relation of Resource Management Area land types and other appropriate land areas to water quality protection.*

**Text as now recommended for change**:

*5. It is not the intent of the board, nor is it the intent of the Act or this chapter, to require that local governments designate all lands within their jurisdiction as Chesapeake Bay Preservation Areas. It is also not the intent of the board to discourage or preclude jurisdiction-wide designations of Resource Management Areas when the local government considers such designations appropriate, recognizing that greater water quality protection will result from more expansive implementation of the performance criteria. The extent of the Resource Management Area designation should always be based on the prevalence and relation of Resource Management Area land types and other appropriate land areas to water quality protection.*

## 9 VAC 10-20-100

### *Intensely Developed Area*

**Comments:** With little explanation, two localities asked that the following language be added to sections A and B. In section A the locality suggested inserting "both RPA and RMA components of" after "of" and before "Chesapeake Bay Preservation Areas". The sentence would then read: *At their option, local governments may designate Intensely Developed Areas as an overlay of both RPA and RMA components of Chesapeake Bay Preservation Areas.* Some localities also suggested deleting "where little of the natural environment remains" from the second sentence in Section B stating that the phrase is vague and is of little use as a criterion to designate IDAs. The sentence would then read: *Areas of existing development and infill sites ~~where little of the natural environment remains~~ may be designated as Intensely Developed Areas provided at least one of the following conditions existed at the time the local program was adopted:*

**Agency Response:** The enumeration of this section was changed. Also, an additional condition (constructed stormwater drainage system) is added to those, which characterize IDAs. This was added upon the recommendation of various commenters during earlier reviews of the regulations. The words "local program adoption date" are substituted for the words "effective date" to provide for more specificity, consistent with the Virginia Code Commission's style conventions and guidelines. CBLAD has provided guidance in the "Local Assistance Manual" regarding the language "where little of the natural environment remains." Futhermore, the proposed language does not preclude localities from including RMA lands in IDA designations. Therefore, staff recommends that no further change be made.

## 9 VAC 10-20-20-105

*CBPA Designation*

**Comments**: Several commenters supported the language providing local governments the option to conduct more thorough investigations so as to more accurately determine the perenniality of streams, which in some cases might extend the RPA designation of streams upstream of those designated as a solid line on the USGS, thereby providing important protection to many streams that are currently not protected by the local CBPA ordinances. Some commenters recommended that site-specific evaluation should be required in order to ascertain whether a stream is perennial or intermittent. One commenter wanted the Board to require local government staff to visually inspect areas under rezoning where development may impact water quality. On the other hand, some localities suggested that the language that makes this an option should be clearer so as to protect this prerogative of flexibility. One commenter cited a particular example of a perennial stream that was buried due to current implementation of the CBPA ordinance in that jurisdiction. Another commenter cited a case where the local government used the broken line on a map to argue that a perennial stream was an intermittent stream and indicated that this particular County does not require site-specific surveys. Some commenters expressed concern that the option for conducting site-specific investigations will lead to difficulties such as providing a clear definition of the term perennial. One commenter was concerned that elected officials would be held responsible for making the determinations and that they would hire consultants who often are one in the same as those employed by developers. Two organizations representing development interests recommended that individuals should also have the right to further determine the limits of tributary streams. One commenter suggested that the state should provide grants to the local governments to conduct wetland delineations to help identify areas appropriate for development.

One County expressed concern that the revised definition of tributary stream and Section 9VAC10-20-105 implies that site-specific information is not required to determine the extent of perennial streams. The County expressed concern that the proposed language suggesting that this is an option appears to be inconsistent with past guidance issued by CBLAD over several years requiring site-specific determinations of RPAs at the Plan of Development stage of a project and recommended that the CBLAD's intent be clarified. With regard to allowing site-specific stream determinations, one commenter pointed up the need to clarify what would constitute a thorough investigation. Several commenters suggested that CBLAD should develop guidance for making distinctions between intermittent and perennial streams to make it possible for local governments to utilize the discretion afforded in the proposed definition.

**Agency Response:** The resolution of this item is associated with the recommendation to delete the definition of tributary stream (see 9VAC 10-20-40), the establishment of criteria for determining certain RPA features (see 9VAC 10-20-80.D), and the establishment of criteria for determining the point of measuring the RPA buffer (see 9VAC 10-20-80.B.5). In short,

the language recommended below requires a site-specific confirmation or delineation of the RPA, including the 100' buffer, during the plan of development review or WQIA review process. This recommendation is consistent with the policy guidance given by the Agency and appears to be the most appropriate resolution of the associated issues.

**Text as initially recommended for change**:

[NOTE: This language was formerly located in 9 VAC 10-20-110.B and was relocated in its entirety, without change (except to references) to 10-20-105.]

*9 VAC 10-20-105. Site-specific refinement of Chesapeake Bay Preservation Area boundaries.*

*Local governments may exercise judgement in determining site-specific boundaries of Chesapeake Bay Preservation Area components and in making determinations of the application of this chapter, based on more reliable or specific information gathered from actual field evaluations of the parcel, in accordance with plan of development requirements in subdivision 1 e of 9 VAC 10-20-231.*

**Text as now recommended for change**:

*9 VAC 10-20-105. Site-specific refinement of Chesapeake Bay Preservation Area boundaries.*

~~*Local governments may exercise judgement in determining site-specific boundaries of Chesapeake Bay Preservation Area components and in making determinations of the application of this chapter, based on more reliable or specific information gathered from actual field evaluations of the parcel, in accordance with plan of development requirements in subdivision 1 e of 9 VAC 10-20-231.*~~

*Local governments shall, as part of their plan-of-development review process pursuant to 9 VAC 10-20-231.1.e or during their review of a water quality impact assessment pursuant to 9 VAC 10-20-130.6, ensure or confirm that site-specific determinations are made of stream perenniality and Resource Protection Area boundaries, based on more reliable or specific information gathered from actual field evaluations of the development site. Local governments may accomplish this by either conducting the site evaluations themselves or requiring the person applying to use or develop the site to conduct the evaluation and submit the required information for review.*

## 9 VAC 10-20-110

### *Stormwater Management*

**Comment:** A number of localities, most notably from the Hampton Roads area, requested that the Board insert a new subsection, as follows: "E.. Compliance with VPDES MS4 permit requirements, the Virginia Stormwater Management Act and regulations, and the Virginia Erosion and Sediment Control Law and regulations shall be deemed as being consistent with the criteria of Part IV of these regulations."

**Agency Response:** To analyze how these programs fit together, it is important to have an understanding of how these programs currently work. The Virginia Stormwater Management Regulations, under the purview of DCR, are voluntary.

They represent an enabling authority and common language that localities are encouraged but not required to use in structuring their local programs. Only a few local SWM programs have been adopted pursuant to the DCR authority within the area regulated by the Chesapeake Bay Preservation Act. While these standards provide an excellent technical basis from which to structure a local SWM program, and are deemed consistent and acceptable to both CBLAD and DEQ, it is not DCR's intent to assume regulatory responsibility for the implementation of these standards, as adopted pursuant to the Chesapeake Bay Preservation Act. While DEQ's VPDES MS4 permit requirements relating to stormwater management promote and encourage the implementation of best management practices and sound water quality management strategies, DEQ has indicated they can provide no assurance that all MS4 permits and resulting local standards will meet or exceed the level of water quality protection mandated by the Chesapeake Bay Preservation Act. While the staff understands the desire of localities to deal with one regulatory agency, the mandates and jurisdictions of these three agencies are distinct and separate, as they relate to stormwater quality. The programs are structured under different State and Federal statutory authorities, with different program goals, and legislative changes would be required to unify them. In fact, a mid-1990's legislative effort to do this was ultimately withdrawn. The proposed changes represent an effort to alleviate these concerns, by providing a uniform set of water quality standards for localities that will satisfy CBLAD, DCR, and DEQ performance standards.

Localities have the option of approaching the Department and the Board with changes to local ordinances or policies to unify or consolidate the application of local criteria to satisfy multiple state mandates. This is the specific intent of the language that states that the equivalent regional stormwater programs that provide the same level of water quality protection are allowed in lieu of the standard on-site BMP criteria. CBLAD is willing to consult with DEQ or DCR to discuss any specific requirements that a locality feels are redundant or overly burdensome, and to consider any alternate practices that cumulatively satisfy the overall water quality goals specified in the Act and Regulations. In fact, a number of localities have incorporated their CBPA program requirements as part of their efforts to satisfy MS4-related requirements, and similarly some localities have incorporated both structural, non-structural and programmatic stormwater efforts implemented pursuant to MS4 requirements to satisfy CBPA water quality requirements. This has been and will continue to be acceptable to, and encouraged by, both the Department and the Board under the proposed regulations.

In light of the perceived duplication of reviews among localities, the three state agencies have agreed upon a uniform and consistent water quality standard to apply to each regulation. This unified standard will allow localities to adopt a single standard to meet the requirements of the Chesapeake Bay Local Assistance Department, Department of Conservation and Recreation and Department of Environmental Quality as they apply to stormwater management. These three agencies already coordinate closely with each other related to stormwater management related issues.

The Board currently has programmatic review authority and a mandate to ensure that water quality requirements are met. Staff considers the proposed regulatory changes as a way to provide uniform and consistent criteria that satisfy CBALD, DCR and DEQ requirements. The Department will attempt, wherever possible, to eliminate any redundancy in reporting requirements by allowing reports or reviews of DEQ or DCR to serve in lieu of any Departmental requirements where they satisfy the same objectives. Therefore, the Department staff recommend that this language be left as proposed, with no

further changes.

## 9 VAC 10-20-110.A

*Stormwater Management*

**Comment:** A number of localities commented that the 10% reduction in NPS pollution may not be achievable when redeveloping waterfront residential land, especially on smaller lots in older neighborhoods. They believe the 10% reduction standard should be applied only to larger areas instead of individual sites.

**Agency Response:** The standard that redevelopment sites provide a ten-percent net reduction in pollutant loadings has and continues to be required by the regulations. The only substantive change relating to this standard is that it would be implemented through the technical standards provided for in the Virginia Stormwater Management Regulations and, therefore, the specific water quality requirements would no longer be referenced in the CBLAD Regulations. This offers localities additional flexibility in implementation by offering an alternative standard called the "Technology-based standard", in addition to the current "Performance-Based approach". The technology-based approach allows localities to implement a menu-driven BMP selection process which makes it easier, in many instances, to satisfy the pollution reduction criteria for highly impervious new development sites. Sites which do not currently exceed the average land cover condition are not required to provide a ten-percent net reduction, and that sites which do exceed the average land cover condition shall provide either a ten percent reduction, or reduce the loading rate to that consistent with the local average land cover conditions, whichever is easier to achieve.

The ten-percent net reduction criteria for redevelopment is necessary to satisfy Chesapeake Bay Agreement commitments to promote reductions of existing pollutant loads in urbanized areas, to meet goals related to the improvement of water quality in the Chesapeake Bay and its tributaries, to provide for consistency with the Virginia Stormwater Management Regulations, and to provide for any substantive pollutant reduction in existing urban areas. This target reduction is also consistent with similar standards In neighboring States. Many more stormwater runoff treatment technologies now exist for ultra-urban sites to assist in meeting this goal, including several new subsurface treatment BMPs referenced in the Virginia Stormwater Management Handbook, which were not envisioned in the original CBPA language or guidance. New technologies will be added as they are developed. In addition the Department is responsive to local efforts to provide for this treatment in a more cost-effective manner through an innovative local or regional stormwater treatment program where the pollutant reduction requirements can be met through the use of off-site facilities and practices.

This issue has been presented to CBLAB as a potential problem since the inception of the program. Achieving a 10% reduction can be difficult to achieve on vacant, infill lots in Intensely Developed Areas. Staff thinks that in this case, it would be more appropriate to achieve the 10% reduction for the entire area and not on a lot-by-lot basis. Local governments are also able to present innovative, equivalent stormwater programs to the Board for consideration. Therefore, the Department staff recommend that this language be left as proposed, with no further changes.

## 9 VAC 10-20-110.D

**Comments:** A number of localities perceive this language to require all localities to incorporate the CBPA into their zoning ordinances, which they believe may result in unnecessary costs and wasted time. A number of localities have established stand alone Bay Ordinances and when it comes to program implementation and enforcement, it makes no

difference whether it is established by a stand alone ordinance or in the Zoning Ordinance. They request that the Board clearly allow stand-alone ordinances to continue in use. For example, one County suggested that this subsection be amended to read ". . . Local governments shall incorporate the criteria in this part into their comprehensive plans, zoning ordinances, and/or such other police and zoning powers as may be appropriate, in accordance with . . ." Others stated that this subsection should provide localities with the specific option adopting a stand-alone ordinance.

**Agency Response:** It was not the Board's intent to prevent localities from continuing to have stand-alone Chesapeake Bay Preservation Area ordinances. To clarify this, staff recommends that the phrase "or such other ordinances as appropriate" be inserted.

Text as initially recommended for change:

[Note: The stricken text is not relevant to the new subject matter. The stricken subject is re-addressed in new Section 10-20-105.]
~~B~~ D. ~~Local governments may exercise judgment in determining site specific boundaries of Chesapeake Bay Preservation Area components and in making determinations of the application of this chapter, based on more reliable or specific information gathered from actual field evaluations of the parcel, in accordance with plan of development requirements in Part V.~~ *Local governments shall incorporate the criteria in this part into their comprehensive plans, zoning ordinances, subdivision ordinances, and such other police and zoning powers as may be appropriate, in accordance with §§ 10.1-2108 and 10.1-2111 of the Act and Parts V (VAC 10-20-170 et seq.), VI (9VAC 10-20-181 et seq.), and VII (9 VAC 10-20-211 et seq.) of this chapter. The criteria may be employed in conjunction with other planning and zoning concepts to protect the quality of state waters.*

**Text as now recommended for change**:

[Only the new language is cited:]
*Local governments shall incorporate these criteria ~~in this part~~ into their comprehensive plans, zoning ordinances, subdivision ordinances ~~and~~, or such other ~~police and zoning powers~~ ordinances and regulations as may be appropriate, in accordance with §§ 10.1-2108 and 10.1-2111 of the Act and Parts V (VAC 10-20-170 et seq.), VI (9VAC 10-20-181 et seq.), and VII (9 VAC 10-20-211 et seq.) of this chapter. The criteria may be employed in conjunction with other planning and zoning concepts to protect the quality of state waters.*

## 9 VAC 10-20-120

*General*

**Comment:** One commenter stated that CBLAD has missed an opportunity in the regulations to articulate more clear, comprehensive criteria to help localities promote "smart" site design. Absent these, localities are left to interpret and apply the general performance criteria piecemeal.

**Agency Response**: CBLAD has provided guidance regarding "smart" site design through a handbook and workshops developed within the last year. However, staff considers such guidance to be continually evolving and, thus, better suited

for continued guidance rather than codified in regulatory language. Therefore, no further change is recommended in response to this comment.

**Comment:** Several localities stated that the Board should delete changes proposed in the first paragraph, which they perceive to represent a substantial change in the program in that it expands CBLAD authority over local governments rather than reinforcing the authority of local governments over regulated activities. The language that ". . . Local governments must ensure that any use, development or redevelopment of land in the CBPAs meet the following performance criteria. . ." increases the burden on localities to justify their individual decisions and actions.to the Board, reducing local discretion to determine what is appropriate and desirable in specific cases. The proposed regulations also prescribe specific implementation measures to be included in local ordinances rather than allowing local decision-makers to tailor the best strategy for their communities.

**Agency Response:** Actually, the change in language referred to in this comment does not constitute a change in practice, but merely a change of context. The Bay Act regulations are directed at local governments. The local governments, by incorporating the regulatory requirements into local ordinances, then extend the regulations to citizens and property owners. However, the original language appeared to regulate the citizens and property owners directly. The proposed change shifts the expectation back onto the local governments, where it belongs. Therefore, staff recommend no further changes in response to this comment.

**9 VAC 10-20-120.2**

*General Criteria*

**Comments:** One commenter stated that this should be changed to begin with "Existing indigenous vegetation . . . ." Several other commenters considered the word "practicable" to function as a loophole. They said it would help if localities had quantitative guidelines applying to protection of native vegetation. Others recommended that the Board should also require preservation of native vegetation to the maximum extent practicable, and should delete the clause "consistent with the use or development proposed."

**Agency Response:** The concept of “preserving” vegetation implies application to existing vegetation. The word “practicable’ is not intended to provide a loophole but, instead, to recognize that in the real world there may be practical limitations to implementing this criterion. The context of the “development proposed” recognizes that different levels of preservation might be achievable on a residential site as opposed to a dense commercial site. In view of these observations, staff recommends no further changes in response to these comments.

**9 VAC 10-20-120.3**

*General Criteria*

**Comment:** One realtor recommended that inspection of on-site BMPs for proper function could be added to realtor sale contract forms, as are septic systems, water systems, and termite inspections already, to provide periodic oversight to assure that needed BMP maintenance is achieved.

**Agency Response:** While this appears to be a good idea, staff considers it outside the scope of these regulations. However, such a strategy could probably be pursued through other means. Therefore, staff recommends no further change in response to this comment.

**Comment:** One County recommended amending this subsection to say: "Where Best Management Practices are used, the local government shall ensure their periodic maintenance, to continue their proper function, through a maintenance agreement with the owner or developer or some other mechanism that achieves an equivalent objective."

**Agency Response:** This is merely a restatement of the existing proposed language. Staff recommends not making this change.

## 9 VAC 10-20-120.5

### *General Criteria*

**Comment:** Several commenters recommended that the regulations should require localities to include language in their Codes regarding specific ways to reduce impervious cover, with one suggesting that such language be based on recommendations from the Center for Watershed Protection.

**Agency Response:** In 9 VAC 10-20-191, the regulations more generally require localities to provide such specific ways to achieve this and other general criteria in their zoning, subdivision and other land use ordinances and regulations. Therefore, CBLAD staff recommends not making this change.

## 9 VAC 10-20-120.6

### *Erosion and Sediment Control*

**Comment:** Since the State E&S Control Law still has a land disturbance threshold of 10,000 sq. ft., CBF objects to removing the language governing single family houses for fear that those with disturbances less than 10,000 sq. ft. may no longer be regulated.

**Agency Response:** This is a valid point, and CBLAD staff concurs.

**Text as initially recommended for change**:

6. Any land disturbing activity that exceeds an area of 2,500 square feet (including construction of ~~all single family houses,~~ septic tanks and drainfields, but otherwise as defined in § 10.1-560 of the Code of Virginia) shall comply with the requirements of the local erosion and sediment control ordinance.

**Text as now recommended for change**:

6. Any land disturbing activity that exceeds an area of 2,500 square feet (including construction of *all single family houses*, septic tanks and drainfields, but otherwise as defined in § 10.1-560 of the Code of Virginia) shall comply with the requirements of the local erosion and sediment control ordinance.

## 9 VAC 10-20-120.7

### *Septic Systems*

**Comment:** The Northern Virginia Regional Commission supports additional flexibility in the regulations to allow for the use of alternative treatment systems, such as package treatment.

**Agency Response:** Acknowledged. This will be communicated to the Board.

**Comments:** One locality appreciates being given more septic system maintenance options, but considers the plastic strainer and alternating drainfield options impractical and ineffective, so they will continue with current requirements. Essex County commented that it does not have the staff to administer proposed complex new rules, such as septic system filters and alternating drain fields requiring notification and monitoring. A number of commenters, representing various interests, stated that the septic drainfield requirements should be administered by a more natural oversight agency, such as the Virginia Department of Health, which already has purview over most local septic system requirements. One commenter noted that the 100% reserve drain field requirement is appropriate for all new lots in small rural localities where public sewer is not available. However, when applied to existing lots, he felt that the proposed septic system criteria amendments may result in increased homeowner costs and local government administrative costs, which are typically passed on to the consumer. Some localities commented that the alternating drainfield option would place more burden on localities implementing it regarding inspections and owner notifications, and perhaps additional review of existing site plan approvals that have not yet been built. Others noted that even given additional options, localities remain concerned about their ability to enforce septic system requirements and the expense to homeowners of regular pump-outs in the absence of specific problems.

**Agency Response:** The Board originally adopted the septic system maintenance criteria as a supplemental requirement to the VDH septic system regulations, since those regulations do not include any septic system maintenance provisions. However, these a represented as options for localities to consider. If the localities perceive the burdens in administering them to be greater than the potential additional water quality protection resulting from their implementation, the localities do not have to offer these options.

## 9 VAC 10-20-120.7.a

*Septic Systems*

**Comments:** A number of commenters generally support the proposed alternatives to the original septic system requirements and, in particular, the plastic filter option. CBF supports the use of the septic tank filter as an additional, but not alternative, requirement, since the filter serves its purpose only once a problem has arisen. Others commented that the plastic filter concept is a good one but that it should be implemented at the discretion of the local government. Furthermore, they noted that periodic septic tank pump-outs and maintenance will still be needed. Others stated that allowing a filter to be installed in lieu of regular pump-out may not be the best course of action. There is a risk the filters may be mistakenly removed. Localities still need to require a regular maintenance schedule.

**Agency Response:** Acknowledged. However, CBLAD staff again note that the filter is an option, and the criteria are consistent with a new provision in the VDH septic system regulations.

**CBLAD STAFF NOTE:** Citing input from constituents, Senator Marty Williams and Delegate Melanie Rapp introduced bills in the 2001 Session of the Virginia General Assembly to amend the Chesapeake Bay Preservation Act to allow septic system inspections in-lieu of the required pump-out. CBLAD, through its Director, discussed the bills with each legislator and informed them of the process involving changes to the regulations. They agreed that amending the regulations was more appropriate than amending the Act. Regulatory language was drafted and agreed upon, as follows:

**Text as initially recommended for change:**

7. On-site sewage treatment systems not requiring a Virginia Pollutant Discharge Elimination System (VPDES) permit shall:

a. Have pump-out accomplished for all such systems at least once every five years~~;~~.

*However, if deemed appropriate by the local health department and subject to conditions the local health department may set, local governments may offer to the owners of such systems, a*~~*s*~~ *as an alternative to the mandatory pump-out, the option of having a plastic filter installed in the outflow pipe from the septic tank to filter solid material from the effluent while sustaining adequate flow to the drainfield to permit normal use of the septic system. Such a filter should satisfy standards established in the Sewage Handling and Disposal Regulations (12 VAC 5-610-10 et seq. of the Virginia Administrative Code) administered by the Virginia Department of Health.*

**Text as now recommended for change:**

7. On-site sewage treatment systems not requiring a Virginia Pollutant Discharge Elimination System (VPDES) permit shall:

b. Have pump-out accomplished for all such systems at least once every five years~~;~~.

~~*However,*~~ *(1)* If *deemed appropriate by the local health department and subject to conditions the local health department may set, local governments may offer to the owners of such systems, as an alternative to the mandatory pump-out, the option of having a plastic filter installed and maintained in the outflow pipe from the septic tank to filter solid material from the effluent while sustaining adequate flow to the drainfield to permit normal use of the septic system. Such a filter should satisfy standards established in the Sewage Handling and Disposal Regulations (12 VAC 5-610-10 et seq.* ~~*of the Virginia Administrative Code*~~*) administered by the Virginia Department of Health.*

*(2) Furthermore, in lieu of requiring proof of septic tank pump-out every five years, local governments may allow owners of on-site sewage treatment systems to submit documentation every five years, certified by a sewage handler permitted by the Virginia Department of Health, that the septic system has been inspected, is functioning properly, and the tank does not need to have the effluent pumped out of it.*

## 9 VAC 10-20-120.7.b

*Septic Systems*

**Comments:** One commenter stated he supports the alternating drainfield option, but questions whether all the language is needed and thinks the Board should provide itself additional flexibility to approve alternative configurations. Some localities expressed serious concern about the administrative burden and cost implications of the notification requirement in the amendment allowing alternating septic drainfields. Even though optional, if not properly monitored, this provision could result in worse water quality. Others felt that the annual notification to alternating drainfield owners should be a local option, not mandatory, and that the Board should consider an option that continues the current 5-year pump-out notice. Another commenter stated that if the local health department chooses to permit alternative septic systems, then it should be required to coordinate closely with other local agencies responsible for the Bay Act implementation, to assess any impacts on the local program.

**Agency Response:** Continuing the current 5-year pump-out cycle is still an valid choice for localities. Again, if localities are concerned about the burden of implementing the alternating drainfield option, they do not need to make it available. In view of the confusion over these options and various concerns expressed, CBLAD staff will ask the Board whether they want to continue to leave these options in the regulations.

**Comment**: Board members raised the issue that the locality should be responsible to seeing that owners are notified of the requirements, but not necessarily be required to make the notification.

**Agency Response:** CBLAD staff **c**oncurs.

**Text as initially recommended for change**:

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9 VAC 10-120.7b (9)
*The local government shall notify owner(s) annually of the requirement to switch the valve to the opposite drainfield.*

**Text as now recommended for change**:

9 VAC 10-120.7b (9)
*The local government shall ~~notify~~ ensure that owner(s) are notified annually of the requirement to switch the valve to the opposite drainfield.*

## 9VAC-10-20-120.8

*Stormwater Management*

**Comments:** Many commenters support the streamlining effect of referencing the Virginia Stormwater Management Regulations. However, some want the Board to maintain language in the regulations holding firm to the no net increase standard for new development and ten percent net reduction for redevelopment.

**Agency Response:** Because CBLAD, DEQ and DCR have all agreed to use a common set of stormwater management standards, as set forth in the State Stormwater Management Law and Regulations, we must use those standards as they exist. We cannot make random, unilateral changes to address an individual issue identified by a single agency, because this risks introducing potential conflicts and confusion. Furthermore, it is better not to reference a common standard and then repeat elements of that standard. If the specified elements change later, then both sets of regulations must be revised. Therefore, CBLAD staff recommends no further changes in response to these comments.

**Comment:** One commenter recommended that the Board increase design requirements for SWM facilities to the 100-year storm event to prevent pollution.

**Agency Response:** Stormwater Management Facilities designed to provide water quality treatment are often designed to provide treatment specifically for the "first flush" of runoff from the impervious areas of a site. This "first flush" often contains the substantive portion of the pollutant wash-off from a site, and subsequent water entering the treatment system is often significantly cleaner. Facilities designed in this fashion treat, in an effective manner, approximately 90% of storm events directed to them. Design of facilities to accommodate the 100-year storm event may be necessary to prevent downstream flooding and property damage, but this requirement is currently implemented pursuant to the Virginia Erosion and Sediment Control requirements, and is not subject to consideration in these regulations. The incorporation of the Virginia Stormwater Management Regulations and the subsequent water quality requirements by reference in these regulations will promote better design, construction and maintenance of stormwater management facilities through the application of the design standards found in the Virginia Stormwater Management Handbook. Future modifications or additions to this handbook will allow Virginia to provide current and updated information about stormwater quality treatment efforts. As the science evolves, the technical standards for stormwater treatment must necessarily evolve also. The reference to the Virginia Stormwater Management Regulations will assist in accommodating this. Staff does not believe there is a sound technical basis for requiring such an increase in the treatment volume, nor would this be cost-effective, given the size and expense of such facilities. However, CBLAD will continue to monitor stormwater literature to update the standards and specifications as new technology is developed. Therefore, the Department staff recommend that this language be left as proposed, with no further changes.

**Comments:** We are still experiencing severe degradation of streams due to loss of recharge areas, increased pavement, and the conversion of headwater stream areas to artificial drainage.

**Agency Response:** The conversion of a natural landscape to a developed landscape typically does result in substantive changes to stream conditions and degradation. Currently, the implementation of stormwater Best Management Practices for both quantity and quality in many areas fails to adequately address this matter, and these impacts still result. The cumulative loss of intermittent streams and the downstream impact of piping these flows can cause irreversible environmental and ecological losses. Nonperennial streams have significant functions and values. A study published in the April 2001 issue of the journal Science indicates that small headwater streams play a disproportionately large role in nitrogen transformations. Research conducted at the University of Georgia and the Stroud Water Research Center in Pennsylvania have demonstrated that first order streams are critical in the overall function of the ecosystem especially the deposition, transformation and export of processed organic matter to downstream reaches of a stream system. According

to these researchers, first and second order streams represent a considerable proportion of the overall stream bottom area available within a watershed where these production and assimilative processes occur. Converting intermittent streams to piped systems under parking lots can also significantly increase temperatures in receiving waters.

The Department has been working to promote better site design principles and low impact development principles that attempt to minimize impacts to the natural hydrologic regime found on a development site, or more adequately mimic pre-development hydrology through the use of Best Management Practices where impacts occur. The Virginia Stormwater Management Handbook, a companion publication to the Virginia Stormwater Management Regulations (a portion of which are incorporated by reference in the proposed regulations) provide standards for biofiltration facilities, and better address the design of a site to minimize impacts than our current standards for pollution reduction. Future updates to this publication will likely include and encourage low-impact development practices to mitigate these impacts more properly. Staff does not consider additional requirements to prevent stream degradation appropriate for this regulatory revision. Future regulations may speak to this issue, when the science related to the preservation of streams has advanced and the regulated public is more aware of the newer innovative stream protection techniques. Therefore, the Department staff recommend that this language be left as proposed, with no further changes.

**Comment:** Some commenters pointed out that the regulations fail to target pollution draining to waterways through ditches from existing urbanized areas.

**Agency Response:** Staff recognizes that the performance standards which require that there be no net increase in non-point source pollutant loads is required only within locally-designated Chesapeake Bay Preservation Areas, which are often of a limited geographic extent, and that because of this a large portion of the cumulative pollutant load resulting from development activities and other land uses may go untreated. This shortfall, which may result in increases in the non-point source pollutant load resulting from land activities, is a result of the overall program structure and requirements resulting from the Act. The Department encourages localities to apply certain performance standards, such as the one requiring stormwater treatment, throughout their entire jurisdiction, and some localities have done this. CBLAD staff agree that expansion of the stormwater treatment requirement to a jurisdiction-wide basis is a sound concept, but one that is beyond the scope of the current regulatory process, as officially Noticed. It is also not clear that the Board has the authority under the Act to require performance standards in areas other than the limited geographic extent of the Chesapeake Bay Preservation Areas. Therefore, the Department staff recommend that this language be left as proposed, with no further changes.

**Comments:** Commenter indicates that the application of the ten-percent net reduction criteria for existing urban areas is overly burdensome and difficult or unachievable. Commenter believes that a stormwater standard that requires a decrease in pollutants is an obstacle to encouraging redevelopment in urban areas. Some comments indicated that the regulations fail to adequately target pollution draining to waterways from existing urban areas not already served by water quality BMPs. Numerous comments supported strict compliance with the “no net increase” standard for new development and the “ten-percent net reduction” standard for redevelopment. One commenter supported the application of the redevelopment criteria to larger areas.

**Agency Response:** The standard that redevelopment sites provide a ten-percent net reduction in pollutant loadings has and continues to be required by the regulations. The only substantive change relating to this standard is that it would be implemented through the technical standards provided for in the Virginia Stormwater Management Regulations and, therefore, the specific water quality requirements would no longer be referenced in the CBLAD Regulations. This offers localities additional flexibility in implementation by offering an alternative standard called the "Technology-based standard", in addition to the current "Performance-Based approach". The technology-based approach allows localities to implement a menu-driven BMP selection process which makes it easier, in many instances, to satisfy the pollution reduction criteria for highly impervious new development sites. Sites which do not currently exceed the average land cover condition are not required to provide a ten-percent net reduction, and that sites which do exceed the average land cover condition shall provide either a ten percent reduction, or reduce the loading rate to that consistent with the local average land cover conditions, whichever is easier to achieve.

The ten-percent net reduction criteria for redevelopment is necessary to satisfy Chesapeake Bay Agreement commitments to promote reductions of existing pollutant loads in urbanized areas, to meet goals related to the improvement of water quality in the Chesapeake Bay and its tributaries, to provide for consistency with the Virginia Stormwater Management Regulations, and to provide for any substantive pollutant reduction in existing urban areas. Many more stormwater runoff treatment technologies now exist for ultra-urban sites to assist in meeting this goal, including several new subsurface treatment BMPs referenced in the Virginia Stormwater Management Handbook which were not envisioned in the original CBPA language or guidance. New technologies will be added as they are developed. In addition the Department is responsive to local efforts to provide for this treatment in a more cost-effective manner through an innovative local or regional stormwater treatment program where the pollutant reduction requirements can be met through the use of off-site facilities and practices. Therefore, the Department staff recommend that this language be left as proposed, with no further changes.

**Comment:** However, the City of Newport News stated that the ten percent net reduction is not achievable on small lots on the Creeks of Newport News. They recommend that the ten percent net reduction be applied to larger areas instead of individual lots.

**Agency Response:** CBLAD allows local governments to submit regional stormwater management programs to the Board for consideration and recognition as achieving equivalent results. Also, CBLAD allows local governments to consider development plans that are more regional in nature, capturing and treating runoff from more than one site. Therefore, CBLAD staff recommends no further changes in response to this comment.

**Comment:** Generally, localities are pleased that the proposed change will finally achieve the goal of consistency between the DCR and CBLAD stormwater performance criteria. However, a number of commenters stated their view that important provisions in the regulations, especially those regarding stormwater management, are redundant or inconsistent with similar regulations and commitments of other state and federal agencies and programs. Furthermore, they believe the overlapping requirements will result in duplicative reporting and other operational inefficiencies.
**Agency Response:** The various state stormwater programs administered by CBLAD, DEQ, and DCR serve different missions and have somewhat different goals and objectives but, as pointed out above, use a common set of stormwater

management standards. While each program may have some additional requirements not found in the others, the three agencies have committed to develop a unified reporting plan so local governments will not have to produce duplicative reports. Therefore, CBLAD staff recommends no further changes in response to this comment.

**Comment:** The DCR program supports applying stormwater management criteria to areas outside of CBPAs as well as those within CBPAs, to address all development activities occurring in the entire local jurisdiction.

**Agency Response:** It is true that a local ordinance adopted under the authority of the State Stormwater Management Law, administered by DCR, extends to the entire jurisdiction, not just to the boundary of the Chesapeake Bay Preservation Area. However, this requirement does not compel a locality to adopt a DCR ordinance, but rather to apply the same standards as DCR uses, as found in the *Virginia Stormwater Management Handbook* within the CBPA. Many Tidewater localities have chosen to apply stormwater management requirements to their entire jurisdictions anyway, even if the CBPA does not extend to the jurisdictional boundary. CBLAD staff recommends no further changes in response to this comment.

**Comment:** Some localities request the Board to concede in the regulations that programs reviewed by DCR and DEQ need not be reviewed by CBLAB.

**Agency Response:** The Board cannot do this. The Bay Act requires the Board to ensure that local governments are implementing their programs correctly. The Board has no authority to expect or require another agency to conduct its reviews, assuming there are reviews, consistent with CBLAD review procedures. Furthermore, the other agencies do not necessarily review for all the same things. The three State stormwater agencies have committed to conduct implementation reviews together, whenever feasible, in order to achieve more efficient use of local staff time involved in such reviews. Therefore, CBLAD staff recommends no further changes in response to this comment.

## 9VAC10-20-120.8.a.(1)

### *Stormwater Management*

**Comment:** A few commenters stated that flexibility should be added to allow for the use of off-site SWM facilities as an option for meeting the SWM criteria and allow developers to cooperate to optimize siting of BMPs outside of formal regional SWM programs.

**Agency Response:** The use of cooperative off-site facilities, which serve to satisfy stormwater quality requirements for multiple development sites is supported and encouraged by the Department. This differs from the authority in the Regulations to develop a regional stormwater management program, in which the locality provides for the implementation of regional- or watershed-scale structural and/or non-structural Best Management Practices and may sell credits to developers to mitigate any increases in loadings. Regional stormwater programs must be reviewed by the Board and found to provide equivalent water quality protection. Cooperative off-site facilities constructed by developers, and/or participated in or facilitated by localities are allowed pursuant to the "on-site" language, provided they meet the same water quality criteria that would be applied on-site. Localities can introduce this option in specific instances through their local site development review process by considering adjacent projects or multiple projects within the same small-scale watershed to be one "site" for water quality planning purposes. Standards and guidelines for the development and planning of such facilities are available in the Virginia Stormwater Management Handbook. The Department is also

developing guidance for determining the "site" area in instances of multiple planning areas, cooperative off-site facilities, and redevelopment activities on large properties, to clarify this issue. Staff believes that no change in the proposed language is needed to accommodate either the larger regional-scale programs, or the use of cooperative off-site facilities, since there are localities that currently allow this option. However, alternate language to clarify that this is an option is provided below.

**Text as initially recommended for change:**

9VAC 10-20-120.8.a
The following stormwater management options shall be considered to comply with this subsection of this chapter:

(1) Incorporation on the site of best management practices that *meet* ~~achieve~~ the ~~required control~~ *water quality protection requirements set forth in this subsection*.

**Text as now recommended for change**:

9VAC 10-20-120.8.a
The following stormwater management options shall be considered to comply with this subsection of this chapter:

(1) Incorporation on the site of best management practices that *meet* ~~achieve~~ the ~~required control~~ *water quality protection requirements set forth in this subsection*. *For the purposes of this subsection, the "site" may include multiple projects or properties which are adjacent to one another or lie within the same drainage area where a single BMP will be utilized by those projects to satisfy water quality protection requirements.*

## 9VAC10-20-120.8.a.(2) and (3)

### *Stormwater Management*

**Comments:** Numerous localities supports referencing achievement of water quality criteria through locally adopted regional SWM programs. However, some localities are concerned about the inherent process duplication in this option. Some commenters recommended deleting or revising this language. They believe that compliance with requirements of a VPDES MS4 permit and that complies with Virginia E&S Control should be deemed to satisfy all the CBLAD regulations or, at least, the stormwater requirements. Such permits are reviewed by DEQ/EPA subject to public comment. However, one commenter stated that, in his opinion, such permits can be obtained too easily by developers because the staff of the permitting agencies are often overworked, discouraged and intimidated. Fairfax County and a few other localities employ alternative stormwater management requirements, slightly different from the criteria in these regulations for achieving storm water quality protection. These alternative methods have been approved by the Board as achieving equivalent results. These localities want some assurance from the Board that they will be allowed to continue employing their approved alternative approaches. A few other localities stated that it will be important for the Board to continue to consider locally developed alternative/equivalent approaches.

**Agency Response:** To analyze how these programs fit together, it is important to have an understanding of how these programs currently work. The Virginia Stormwater Management Regulations, under the purview of DCR, are voluntary. They represent an enabling authority and common language that localities are encouraged but not required to use in structuring their local programs. Only a few local SWM programs have been adopted pursuant to the DCR authority within the area regulated by the Chesapeake Bay Preservation Act. While these standards provide an excellent technical basis from which to structure a local SWM program, and are deemed consistent and acceptable to both CBLAD and DEQ, it is not DCR's intent to assume regulatory responsibility for the implementation of these standards, as adopted pursuant to the Chesapeake Bay Preservation Act. While DEQ's VPDES MS4 permit requirements relating to stormwater management promote and encourage the implementation of best management practices and sound water quality management strategies, DEQ has indicated they can provide no assurance that all MS4 permits and resulting local standards will meet or exceed the level of water quality protection mandated by the Chesapeake Bay Preservation Act. While the staff understands the desire of localities to deal with one regulatory agency, the mandates and jurisdictions of these three agencies are distinct and separate, as they relate to stormwater quality. The programs are structured under different State and Federal statutory authorities, with different program goals, and legislative changes would be required to unify them. In fact, a mid-1990's legislative effort to do this was ultimately withdrawn. The proposed changes represent an effort to alleviate these concerns, by providing a uniform set of water quality standards for localities that will satisfy CBLAD, DCR, and DEQ performance standards.

Localities have the option of approaching the Department and the Board with changes to local ordinances or policies to unify or consolidate the application of local criteria to satisfy multiple state mandates. This is the specific intent of the language that states that the equivalent regional stormwater programs that provide the same level of water quality protection are allowed in lieu of the standard on-site BMP criteria. CBLAD is willing to consult with DEQ or DCR to discuss any specific requirements that a locality feels are redundant or overly burdensome, and to consider any alternate practices that cumulatively satisfy the overall water quality goals specified in the Act and Regulations. In fact, a number of localities have incorporated their CBPA program requirements as part of their efforts to satisfy MS4-related requirements, and similarly some localities have incorporated both structural, non-structural and programmatic stormwater efforts implemented pursuant to MS4 requirements to satisfy CBPA water quality requirements. This has been and will continue to be acceptable to, and encouraged by, both the Department and the Board under the proposed regulations. Localities, such as Fairfax County, that have received approval of "equivalent" stormwater management approaches will not have to resubmit or change these.

The Board currently has programmatic review authority and a mandate to ensure that water quality requirements are met. Staff considers the proposed regulatory changes as a way to provide uniform and consistent criteria that satisfy CBALD, DCR and DEQ requirements. As noted above, the Department has committed, where feasible, to eliminate any redundancy in reporting requirements by allowing reports or reviews of DEQ or DCR to serve in lieu of any Departmental requirements where they satisfy the same objectives.

In light of the above comments, CBLAD staff recognizes that further clarification of these requirements might be helpful. The following changes provide that a local may demonstrate that their VPDES program does, indeed, achieve equivalent stormwater management results (submitted as a major local program modification) and, subject to Board approval,

operate the program as an "equivalent" program. Also, while the previous text provided for local consideration of a private VPDES activity, the following changes should provide more clarification.

**Text as initially recommended for change**:

9VAC 10-20-120.8.a.

(2) Compliance with a locally adopted regional stormwater management program ~~incorporating pro-rata share payments pursuant to the authority provided in § 15.1-466(j) of the Code of Virginia that results in achievement of equivalent~~ *reviewed and found by the board to achieve water quality protection equivalent to that required by this subsection; and*

(3) Compliance with *an individual permit issued by* a state or locally implemented program of stormwater discharge permits pursuant to § 402(p) of the federal Clean Water Act, as set forth in 40 CFR parts 122, 123,124, and 504~~; and~~, *provided that the local government specifically determines that the permit requires measures that collectively achieve water quality protection equivalent to that required by this subsection.*

**Text as now recommended for change:**

(2) Compliance with a locally adopted regional stormwater management program*, including a Virginia Pollution Discharge Elimination System (VPDES) permit issued by the Department of Environmental Quality to a local government for its municipally owned separate storm sewer system discharges,* ~~incorporating pro-rata share payments pursuant to the authority provided in § 15.1-466(j) of the Code of Virginia that results in achievement of equivalent~~ *that is reviewed and found by the board to achieve water quality protection equivalent to that required by this subsection; and*

(3) Compliance with ~~*an individual permit issued by*~~ a ~~state or locally implemented program of stormwater discharge permits pursuant to § 402(p) of the federal Clean Water Act, as set forth in 40 CFR Parts 122, 123, 124, and 504; and~~ *a site-specific VPDES permit issued by the Department of Environmental Quality, provided that the local government specifically determines that the permit requires measures that collectively achieve water quality protection equivalent to that required by this subsection.*

## 9 VAC10-20-120.8.a.(4)

*Stormwater Management*

**Comment:** A number of commenters recommended retaining this deleted option of allowing pollution removal credit for replacing impervious surface with vegetation. This is especially important in urban areas, where old problems can be addressed without having to install expensive "retrofit" BMPs.

**Agency Response:** The current pollutant removal requirements offer an option which states that a redevelopment site that is completely impervious may meet the requirements by restoring a minimum of 20% of the site to vegetated open

space. This option is an alternative to the requirement for a 10% net reduction in pollutant loads and can still be provided consistent with the referenced DCR stormwater quality requirements, even though it will not be specifically set forth in the regulations. The option was eliminated to simplify the reference to the DCR requirements and to avoid the potential for language conflicts in the future (more general, less specific language used). A ten percent net reduction can be accomplished for many such sites without removing and restoring the entire 20%. In fact, a restoration of 10-11% of a completely impervious site to green space will generally meet the 10% net reduction requirement. Localities may choose to keep the 20% restoration option in their local ordinances if they wish, as a twenty percent restoration is more stringent than the regulations call for, but should realize that a restoration of less than 20% will also meet the numeric pollutant reduction requirements. Therefore, the Department staff recommend that this language be left as proposed, with no further changes.

**9 VAC 10-20-120.8.b**

*Stormwater Management*

**Comment:** One commenter appeared to be confused about meaning of terms "alteration" and "improvement", suggesting that clarification is needed.
**Agency Response:** The commenter did not appear to understand that the provision applies to stormwater management BMPs, not to other structures such as buildings. Therefore, CBLAD staff recommend that this language be left as proposed, with no further changes.

**9 VAC-10-20-120.9**
*Agriculture*

**Comments:** Some commenters complimented the Board for proposed changes to the agricultural requirements, which should be beneficial and allow the system to operate more efficiently. The flexibility being added regarding conservation assessments versus plans is a good thing, and will probably make better use of taxpayer money. In particular, the Virginia Agribusiness Council commended the board for proposing changes that will create an efficient management of proposed soil and water conservation assessments, as consistent with State regulatory requirements that regulations be the least burdensome and intrusive to the regulated parties. A number of commenters stated that localities must enforce the Bay Act on agricultural and forestry activities, and yet these two uses appear to be exempt from the regulations. They perceive that the agricultural buffer allowances are inconsistent with non-agricultural requirements and that rural, residential landowners bear more of the burden than agricultural or forest owners. They stated that standards should apply equally/evenly for all land uses and should apply to the entire Bay watershed.

**Agency Response**: The agricultural industry successfully argued during the original regulation development process that the requirement to have a conservation plan developed would give the local, state and federal conservation agencies access to many farmers with whom they had not previously been able to work and that they would then be able to exercise their persuasive influence to convince the farmers to implement some or all aspects of these plans without having implementation required in the regulations. The requirement for BMP or full plan implementation were reserved for those tracts where 50-foot and 75-foot modifications, respectively, into the buffer were allowed for production purposes. Calculations were performed by the USDA-Natural Resource Conservation Service at that time demonstrating that implementing even a single nutrient management or erosion control practice (BMP) on an entire field achieved greater

pollution removal than the 100-foot buffer by itself. These agricultural practices are revisited, maintained, and or updated annually as part of the farm=s production plan, unlike many urban BMPs. Furthermore, there is substantial anecdotal evidence that many farmers are, indeed, implementing substantial elements of their plans voluntarily, even without such a requirement. CBLAD staff recommends no further changes in response to these comments.

**Comment:** Several commenters noted that no mention is made in the regulations of the need to plan for land conversion from forest to agriculture, which occurs often in Fairfax and other suburban areas.

**Agency Response:** CBLAD is continuously working with the DCR to clarify what land agricultural land disturbance activities are exempt form local E&S requirements. This topic also relates to the conversion of land from a forested use to an agricultural use, and is of particular interest to the CBLAD when this is performed within the 100' buffer. Currently, CBLAD has allowed such conversions within the 100' if the landowner agrees to implement a soil and water quality conservation plan. CBLAD staff recommends no further changes in response to this comment.

**Comment:** The regulations do not point out that agriculture must adhere to other laws that may be applicable, e.g., biosolids regulations, poultry regulations, etc. One commenter noted that sludge applied by farmers is running off into nearby creeks, causing fish kills and algal blooms.

**Agency Response:** The regulations need not point out that the farmer/landowner may be subject to other federal/state/local laws, regulations, or ordinances. However, local SWCD conservation planners should make the farmer/landowner aware of any applicable federal/state/local laws, regulations, or ordinances, and direct them to the appropriate permitting or regulatory authority. CBLAD staff recommends no further changes in response to these comments.

**Comments:** A number of commenters, in particular the Virginia Farm Bureau, prefer that SWCDs continue to develop Soil and Water Quality Conservation Plans where necessary, and not stop at completing an "assessment." A few asked if the new agricultural conservation "assessment" and criteria would be more extensive and more stringent than the current requirement of a conservation plan. Some are not convinced that changing to an assessment process will save a significant amount of planning time over the more holistic process of developing a complete comprehensive agricultural conservation plan. Some feel that language requiring localities to "ensure" that agricultural conservation plans are developed and water quality is protected is another unfunded mandate, and that the SWCDs need more resources to be able to complete more agricultural conservation plans or assessments within a reasonable time frame.

**Agency Response:** The agricultural work group recommended the assessment approach to improve the efficiency of the agricultural program. During the development of the assessment process, the CBLAD will work in conjunction with the natural resource partners and stakeholders to develop a process that meets the regulatory requirements and provides economy over the current SWQCP process. The assessment process should enable the conservation planner to spend more time with farmers/landowners whose environmental constraints require more in-depth conservation analysis. Additionally, the conservation planner may develop any necessary elements of a SWQCP, or require specific corrections of identified pollution problems within specified time frames. CBLAD staff recommends no further changes in response to these comments.

**Comment:** Several commenters consider it counter-productive to remove the deadline for completing conservation plans altogether. They consider having no deadline to complete assessments to weaken the urgency of completing the work. They recommend that the Board require the SWCDs to complete assessments within a reasonable, yet certain time

frame.

**Agency Response:** Due to limited resources to provide conservation planning assistance, the 1995 deadline could not be met. Given the uncertainty of the Commonwealth's budget, and the inability of livestock and grain producers to pass their environmental costs to the consumer, it would be difficult to establish a reasonable deadline. The draft regulations do instruct the conservation planners to place a higher planning priority on RPA tracts. CBLAD staff recommends no further changes in response to these comments.

**Comments:** A very large number of commenters stated that agricultural activities should have more requirements than are currently applied, and they support the Board changing the regulations to require full implementation of all agricultural soil an water conservation plans. In addition, some stated that this section should also reflect the need for agricultural operations to comply with other agricultural permitting requirements, such as the new requirements for nutrient management plans for poultry growing facilities.

**Agency Response:** The agricultural industry successfully argued during the original regulation development process that the requirement to have a conservation plan developed would give the local, state and federal conservation agencies access to many farmers with whom they had not previously been able to work and that they would then be able to exercise their persuasive influence to convince the farmers to implement some or all aspects of these plans without having implementation required in the regulations. The requirements to implementation a BMP or a full plan were reserved for those tracts where 50-foot and 75-foot modifications, respectively, into the buffer were allowed for production purposes. Calculations were performed by the USDA-Natural Resource Conservation Service at that time demonstrating that implementing even a single nutrient management or erosion control practice (BMP) on an entire field achieved greater pollution removal than the 100-foot buffer by itself. These agricultural practices are revisited, maintained, and or updated annually as part of the farm=s production plan, unlike many urban BMPs. Furthermore, there is substantial anecdotal evidence that many farmers are, indeed, implementing substantial elements of their plans voluntarily, even without such a requirement. The regulations do not need to reference other requirements, such as nutrient management requirements for poultry operations or DEQ permits for confined animal operations. Those are stand-alone programs. The Board's NOIRA did not specify any consideration of more stringent requirements for agricultural activities. Therefore, CBLAD staff recommends no further changes in response to these comments.

**Comment:** The Bay Act program should maintain the confidentiality of information in a farm's assessment/plan. This information should be considered proprietary and confidential business information, and should not be available to the public under the FOIA..

**Agency Response:** In a November 19, 1993 meeting between the CBLAD, DCR, the Office of the Attorney General, it was stated that SWCDs are subject to the FOIA, and that no exemptions or exclusions existed at that time, i.e, any information contained in the SWCD file is vulnerable under the FOIA. Typically, however, SWQCPs are within the federal, USDA-NRCS file, which is protected from the FOIA. Making changes to these regulations to try to affect FOIA requirements is beyond the Board's authority. Therefore, no changes are recommended.

**Comment:** DCR noted that the correct name is the "Virginia Agricultural BMP Manual." There is no 2001 edition (it is updated "periodically"). The suggested that the Board replace the reference to the "2001 edition" of the Cost Share BMP Manual with the "latest edition."

**Agency Response:** The regulations of the Registrar of Regulations, pertaining to the development of regulations, specify

that referenced works must have a date assigned and cannot be referenced as "the most recent edition."

**Text as now recommended for change: (Since this is a technical amendment, only the change is shown)**

9VAC10-20-120.9

a. Recommendations for additional conservation practices need address only those conservation issues applicable to the tract or field being assessed. Any soil and water quality conservation practices that are recommended as a result of such an assessment and are subsequently implemented with financial assistance from federal or state cost-share programs must be designed, consistent with cost-share practice standards in effective in January, ~~1998~~ *1999* in the "Field Office Technical Guide" of the U.S. Department of Agriculture Natural Resource Conservation Service or the latest edition January 2001 edition of the "Virginia ~~Cost Share~~ *Agricultural* BMP Manual" of the Virginia Department of Conservation and Recreation, respectively. Unless otherwise specified in this section, general standards pertaining to the various agricultural conservation practices being assessed shall be as follows:

**Comment:** One commenter noted that the amended agricultural criteria reference various federal, state and local standards, and that these should all be investigated to ensure the standards do not conflict.

**Agency Response:** There is an on-going inter-agency coordination process that prevents conflicts among these various sets of standards. As BMPs gain acceptance from the agricultural community, and become more widely used, the Commonwealth typically removes them from the cost share list. Nevertheless, such practices, and their standards, remain effective in reducing NPS pollution and should be part of any SWQCP that is developed. Regarding the selection of particular BMPs, such choices are left to the local SWCD staff, the SWCD Board, and their local partners. In view of this, CBLAD staff recommend no further changes in response to this comment.

**Comment:** A few commenters noted that if financial assistance (cost-share) is not provided to farmers and they are avoiding buffer encroachments, they do not have to implement their conservation plans. Some refuse financial assistance so they are not compelled to implement their plans. The 100-foot buffer may not be enough protection from some egregious agricultural land management problems.

**Agency Response:** Acknowledged. At the current time, that is the way the requirements are structured. The Board's NOIRA did not specify any consideration of more stringent requirements for agricultural activities. Therefore, CBLAD staff recommends no further changes in response to these comments.

**Comment:** The Southern Environmental Law Center recommends that the language be changed to the following: "Land upon which agricultural activities are being conducted, including but not limited to crop production, pasture, and dairy and feedlot operations*, or lands otherwise defined as agricultural land by the local government,* shall have a soil and water quality conservation plan [restore the deleted language] as well as an assessment conducted regarding the effectiveness of practices in the plan pertaining to soil erosion and sediment control, nutrient management, and management of pesticides to ensure that water quality protection is being accomplished.

**Agency Response:** CBLAD staff concurs with the proposal to recognize lands defined by the locality as agricultural, and recommends the following revision.

**Text as initially recommended for change:**

9. Land upon which agricultural activities are being conducted, including but not limited to crop production, pasture, and dairy and feedlot operations shall have a soil and water quality conservation ~~plan. Such a plan shall be based upon the "Field Office Technical Guide" of the U.S. Department of Agriculture Natural Resource Soil Conservation Service and accomplish~~ *assessment conducted regarding the effectiveness of existing practices pertaining to soil erosion and sediment control, nutrient management, and management of pesticides to ensure that* water quality protection *is being accomplished* consistent with the Act and this chapter. ~~Such a plan will be approved by the local Soil and Water Conservation District by January 1, 1995.~~

**Text as now recommended for change:**

9. Land upon which agricultural activities are being conducted, including but not limited to crop production, pasture, and dairy and feedlot operations*, or lands otherwise defined as agricultural land by the local government,* shall have a soil and water quality conservation ~~plan. Such a plan shall be based upon the "Field Office Technical Guide" of the U.S. Department of Agriculture Natural Resource Soil Conservation Service and accomplish~~ *assessment conducted regarding the effectiveness of existing practices pertaining to soil erosion and sediment control, nutrient management, and management of pesticides to ensure that* water quality protection *is being accomplished* consistent with the Act and this chapter. ~~Such a plan will be approved by the local Soil and Water Conservation District by January 1, 1995.~~

**Comment:** It is unclear what standards would be used if BMPs that are not cost-shared are being implemented on the tract. This could lead to inconsistent standards for agricultural BMPs. Recommends to remove the language "are implemented with financial assistance from federal or state [funds]".

**Agency Response:** As BMPs gain acceptance from the agricultural community, and become more widely used, the Commonwealth typically removes them from the cost share list. Nevertheless, such practices, and their standards, remain effective in reducing NPS pollution and should be part of any SWQCP that is developed. Regarding the selection of particular BMPs, such choices are left to the local SWCD staff, the SWCD Board, and their local partners. These professionals reference the same sources of standards for both cost-shared and non-subsidized BMPs. Therefore, CBLAD staff recommend no further changes in response to this comment.

**Comment:** It is not clear whether this new assessment requirement is more stringent and extensive than the original conservation plan requirement.

**Agency Response:** The agricultural work group recommended the assessment approach to improve the efficiency of the agricultural program. During the development of the assessment process, the CBLAD will work in conjunction with the natural resource partners and stakeholders to develop a process that meets the regulatory requirements and provides economy over the current SWQCP process. The assessment process should enable the conservation planner to spend more time with farmers/landowners whose environmental constraints require more in-depth conservation analysis. Additionally, the conservation planner may develop any necessary elements of a SWQCP, or require specific corrections of identified pollution problems within specified time frames. At the end of this process, CBLAD expects the result to be a complete conservation plan, just as is currently required, but one that is derived through a more efficient process.

Therefore, CBLAD staff recommend no further changes in response to this comment.

**Comment**: Various commenters stated that that the regulations are an "unfounded mandate;" and SWCDs need more resources to complete SWQCPs within a reasonable time frame.

**Agency Response:** The Board recognizes the limitations posed by limited resources, and CBLAD has continually sought additional funds, when appropriate, through the Commonwealth's budgeting process.

## 9 VAC 10-20-120.10

*Silviculture*

**Comment:** One commenter asked the Board to continue to allow silvicultural activities to be exempted from local CBPA requirements if they comply with appropriate Department of Forestry BMPs.

**Agency Response:** Acknowledged.

**Comment:** Several commenters asked the Board to retain the deleted language: "In the event that . . . the Department of Forestry programs are unable to demonstrate equivalent protection of water quality consistent with the Act and these regulations, DOF will revise its programs to assure consistency of results."

**Agency Response:** Maintaining this statement in the regulations will have no practical meaning, since the Board has no authority to require the DOF to revise its programs. Therefore, CBLAD staff recommend leaving the language the way it is.

**Comment:** A very large number of commenters, including a number of local governments, consider the regulations to totally exempt forestry activities and stated that forestry operations should have to comply with the Bay Act. They stated that this exemption from the regulations for silvicultural activities should be ended. Such activities should be required to preserve and establish riparian forest buffers. To accomplish this, the commenters feel that DOF needs adequate enforcement authority. Furthermore, some commenters expressed confusion over a County's authority over forestry activities, given DOF's powers in 10.1-1181.1 of the Code of Virginia.

**Agency Response:** Silvicultural activities (e.g., logging) are not exempt from water quality protection requirements within Chesapeake Bay Preservation Areas. They are exempt from having to apply for approval through the normal local plan-of-development review process, etc. if, and only if, they implement all the silvicultural best management practices (BMPs) that are applicable to the tract under management or being logged. Furthermore, loggers are subject to the State Silvicultural Water Quality Act, which gives the Department of Forestry (DOF) authority to assure logging is being conducted in a manner that will protect water quality and to enforce the law against violators. Local governments have authority over this through this provision of the regulations, pursuant to Section 10.1-2113 of the Act, which states that the Board's authorities are "supplemental" to those of other agencies, as long as the Board's actions do not interfere with those other authorities. The Board's NOIRA did not specify any consideration of more stringent requirements for silvicultural activities. Therefore, CBLAD staff recommends no further changes in response to these comments.

**Comment:** A number of commenters called attention to the fact that some developers abuse the silvicultural exemption

(calling their activities timber harvesting when, in fact, they are clearing land for development). No provisions are made in the regulations to provide for the conversion of land from forest to agricultural or other uses. They stated that localities should be given the option of limiting land subject to the silvicultural "exemption" to that which is truly used for agricultural or long-term timber management (perhaps to land upon which timber harvesting was ongoing at the beginning of the Bay Act program).

**Agency Response:** CBLAD staff concur. This is perhaps the most frequent complaint CBLAD gets regarding logging. In that vein, staff proposes the following additional provision in the regulations, to be added subsection 130.3 as subdivision (b) which, taken together with the newly recommended definition of "silvicultural activities," should limit this phenomenon as a "loophole."

**Text as now proposed for change:**

*b. Where land uses such as agriculture or silviculture within the area of the buffer cease and the lands are proposed to be converted to other uses, the full 100-foot wide buffer shall be reestablished. In reestablishing the buffer, management measures shall be undertaken to provide woody vegetation that assures the buffer functions set forth in this chapter.*

**Comment:** A few local governments recommended that the silvicultural exemption should be deleted, and the Board should insert a new subsection that allows development/redevelopment in IDAs that complies with VPDES MS4 permits and DCR stormwater management and erosion control laws/regulations to be deemed consistent with the Bay Act performance criteria.

**Agency Response:** CBLAD staff disagrees. See discussion under comments on 9 VAC 10-20-120.8.a.2. Staff recommends no further changes in response to this comment.

**Comment:** The Southern Environmental Law Center recommended that the language be changed to something akin to their recommendation for changed language pertaining to agriculture, perhaps as follows: "Land upon which silvicultural activities are being conducted, including but not limited to timber management and timber harvesting, or lands otherwise defined as silvicultural land by the local government, shall have a timber management plan or a timber harvesting plan, as appropriate, to ensure that water quality protection is being accomplished.

**Agency Response:** The Board's NOIRA did not specify any consideration of more stringent requirements for silvicultural activities. Therefore, CBLAD staff recommends no further changes in response to these comments.

## 9 VAC 10-20-120.11

*Wetland Permits*

**Comments:** Some commenters stated that the Board should replace the word "shall" with the word "may." Some localities requested the Board to insert "pursuing" between the words "of" and "all." Requiring that all permits be obtained prior to granting approval will unreasonably delay the local plan review process.

**Agency Response:** The Board's intent is that this is a requirement, not a permissive/optional criterion, so "shall" is appropriate. The Board considers it important that permits have been obtained, not just pursued, before land disturbance begins. Therefore, CBLAD staff recommends no further changes in response to these comments.

## 9 VAC 10-20-130.1

*RPA Uses*

**Comments:** CBF supports the proposed changes in subsections 1.a through 1.d, which are considered essential to proper implementation of RPA protections from existing local government abuses. However, some localitiesrequested that this section be amended to say "Land development may, subject to approval by the local government, be allowed in the Resource Protection Area only if . . . ." Other comments were made regarding what is meant by subdivision-scale and regional-scale facilities and whether the use of "flood control" and "stormwater management facilities" were redundant in this context.

**Agency Response:** The suggested language will clarify the intent of the regulations, and CBLAD staff agrees it should be added as suggested. In addition, clarification is provided through the elimination of the reference to subdivision scale and regional BMPs and instead addressing the matter through an approved local stormwater management plan. This item is addressed in the changes to subsection 130.1.e, below.

**Text as initially recommended for change:**

There were no initial recommendations by the Department regarding this subject; however, there are several changes proposed for the affected sections. In addition, the changes to the definition of "redevelopment" affected this section. The initial recommended text change for these sessions follow. The next section shows all of the changes i.e. original changes, those from the redevelopment issue, and with the language suggested by James City County shown in *italics*.

9VAC 10-20-130 ~~Performance~~ *Use and development* criteria for Resource Protection Areas.

~~The following criteria shall apply specifically within Resource Protection Areas and supplement the general performance criteria~~ In addition to the general performance criteria set forth in 9VAC 10-20-120, the criteria in this section are applicable in Resource Protection Areas.

~~A~~ 1.~~Allowable development~~ *Permitted uses*. ~~A water quality impact assessment shall be required fro any proposed development in accordance with Part V.~~ Land development may be allowed *in the Resource Protection Area* only if it (i) is water dependent; ~~or~~ (ii) constitutes *the continuance or* redevelopment *of a use existing at the time of local program adoption; (iii) is a new use established pursuant to subdivision 4 a of this section; (iv) is a road or driveway crossing satisfying the conditions set forth in subdivision 1 d of this section; or (v) is a flood control or stormwater management facility satisfying the conditions set forth in subdivision 1 e of this section*.

**Text as now recommended for change:**

9VAC 10-20-130 - - ~~Performance~~ *Use and development* criteria for Resource Protection Areas

~~*A*~~ *1. ~~Allowable development~~ Permitted Uses. ~~A water quality impact assessment shall be required for any proposed development in accordance with Part V.~~* Land development may be allowed *in the Resource Protection Area,* subject to approval by the locality*, be allowed in the Resource Protection Area, subject to approval by the local government,* only if it (i) is water dependent; ~~or~~ (ii) constitutes ~~*the continuance or*~~ *redevelopment ~~of a use existing at the time of local program adoption~~; (iii)* constitutes development or redevelopment within a designated Intensely Developed Area; *(iv) is a new use established pursuant to subdivision 4.a of this section; ~~(iv)~~ (v) is a road or driveway crossing satisfying the conditions set forth in subdivision 1.d of this section; or ~~(v)~~ (vi) is a flood control or stormwater management facility satisfying the conditions set forth in subdivision 1.e of this section. . . .*

c. Redevelopment *outside IDA's, shall be permitted in the Resource Protection Area only if there is no increase in the amount of impervious cover and no further encroachment within the Resource Protection Area and it* shall conform to applicable ~~storm water management and~~ erosion and sediment control ~~criteria in this part~~ *and stormwater management criteria set forth in subsections 6 and 8, respectively, of 9 VAC 10-20-120, as well as all applicable stormwater management requirements of other state and federal agencies*.

## 9 VAC 10-20-130.1.b

*RPA Uses*

**Comment:** Concerned that some localities may be approving development projects as "water dependent" when they are not truly water dependent.

**Agency Response:** Acknowledged. This is an oversight issue, not a regulatory issue.

## 9 VAC 10-20-130.1.b.(1)

*RPA Uses*

**Comments:** A few localities agreed that this requirement makes sense for large facilities, such as marinas, waterfront park development, commercial and industrial piers and dry docks, etc. However, they feel that strict enforcement could preclude residential piers that are not typically identified in comprehensive plans. They recommend that the Board restore the original language or provide an exemption from this requirement for residential piers.

Some localities noted that this is a much more stringent/burdensome standard than the existing requirement and is too rigid. They point out that comprehensive plans do not and should not designate where certain facilities should be specifically located. Comprehensive Plans designate broad, allowable uses, not specific activities. They consider it is unreasonable for localities to have to predict where all water-dependent facilities will be located. With this language, in each case a proposed future water dependent facility were not specifically mentioned in the comprehensive plan, the locality would have to go through advertising and holding a public hearing to do a plan amendment. They point out that this proposal conflicts with the way local governments normally address this kind of issue (through zoning, not the

comprehensive plan). They recommend that the original language in this subsection should be restored or that the Board clarify the wording so that it does not require more frequent comprehensive plan amendments for specific uses that may be covered under the current, more general language of the local comprehensive plan.

**Agency Response:** CBLAD staff agrees. Thus, staff recommends that the initially proposed change not be adopted and that the original language be retained.

**Text as initially recommended for change:**

9VAC 10-20-130.1.b A new or expanded water-dependent facility may be allowed provided *that* *the following criteria are met:*

~~a.~~ *(1)* It ~~does not conflict *with*~~ *is proposed to be located in an area designated for such facilities in* the comprehensive plan;

Text as now recommended for change:

~~a.~~ *(1)* It ~~does not conflict with~~ *does not conflict with* ~~*is proposed to be located in an area designated for such facilities in*~~ the comprehensive plan;

## 9 VAC 10-20-130.1.e

*RPA Uses*

**Comments:** Commenters had various concerns and suggestions about new language that would allow large-scale stormwater management facilities to be constructed within the RPA. Comments ranged from supporting the language as it appears to rejecting it altogether. The building industry generally supports listing stormwater management BMPs as "water-dependent facilities," which would allow them to be built within the RPA by right. Some commenters, generally representing environmentalist points-of-view, recommended deleting this provision altogether, stating that such facilities should not be allowed within RPAs. Some local governments noted that this language is not needed, since applicants can apply to do this through the exception process. Other localities welcomed this flexibility, but recommended that local government approval should be added to the list of conditions so it is clear that the flexibility is not a Aby right@ provision. Still others commented that if this is to be allowed, the Board should further clarify where and when these types of facilities are acceptable B for example, only allow them if they are identified as sites for such facilities in a watershed or regional stormwater master plan B and/or provide definitions for Asubdivision scale facilities@ and Aregional scale facilities,@ to prevent this flexibility extending to small-scale, single-lot BMPs.

**Agency Response:** The impetus for this change is that watershed-wide or other regional-scale stormwater management planning is encouraged, to more comprehensively and holistically address stormwater issues. However, the larger-scale facilities that are often components of such plans may need to be built in low-lying parts of the watershed or site, perhaps along headwater or ephemeral streams, which may be part of the RPA. The intent of this change is to allow for the construction of large-scale water quantity and quality control BMPs where locating such facilities within the buffer would

provide the best water quality treatment and protection, provided that sufficient scrutiny is provided and that the project is considered eligible for all applicable permits to be obtained. However, the proposed language does not go so far as to declare large-scale stormwater management facilities to be declared "water-dependent facilities," and it was not intended to include small, single-lot BMPs.

In order to maintain the original intent of this change while addressing legitimate concerns about the proposed language, the Department proposes some further changes in the language, based on the following rationale:

$ Eliminating the terms "subdivision-scale" and "regional-scale" will negate the need to define them;

$ If the allowed facilities were limited to those that are included in a local stormwater master plan, the potential use of such facilities will have been considered by the locality in a comprehensive manner;

$ If the allowed facilities were limited to those included in a local stormwater master plan that was approved by the Board as a local program modification (e.g., equivalent stormwater management approach or program), the Board would be able to assess the program with respect to comprehensive water quality protection considerations, helping to legitimize the approach specific to local conditions. If a locality does not wish to accommodate such facilities within RPAs, it would not include them in its stormwater master plan. Conversely, if a facility proposed for location within the RPA were not reflected in the local stormwater master plan, the applicant would have to apply for an exception and submit a major water quality impact statement;

$ It should be pointed out that it is not the intent to approve any stormwater master plan that provides for individual lot BMPs to be located within RPAs

**Text as initially recommended for change:**

*e. Subdivision-scale and regional-scale flood control and stormwater management facilities may be constructed in Resource Protection Areas if all applicable permits for construction in state or federal waters have been obtained from the appropriate state and federal agencies, such as the U.S. Army Corps of Engineers, the Virginia Department of Environmental Quality, and the Virginia Marine Resources Commission.*

**Text as now recommended for change:**

*e. ~~Subdivision-scale and regional-scale flood~~ Flood control and stormwater management facilities that drain or treat water from multiple lots or sites or from a significant portion of a watershed may be ~~constructed~~ allowed in Resource Protection Areas provided that such facilities are consistent with a stormwater management program that has been approved by the Board as a Phase I modification to the local government's program. Furthermore, ~~if~~ all applicable permits for construction in state or federal waters ~~have been~~ must be obtained from the appropriate state and federal agencies, such as the U.S. Army Corps of Engineers, the Virginia Department of Environmental Quality, and the Virginia Marine Resources Commission and approval must be received from the local government prior to*

*construction. It is not the intent of this subdivision to allow the placement of best management practices on individual lots within a Resource Protection Area.*

**9 VAC 10-20-130.2**

*Exemptions*

**Comments:** Some commenters prefer that this subsection state more clearly that localities may exempt these activities but are not required to. One County recommended locating this buffer exemptions subsection in with the "Non-Conformities, Exemptions and Exceptions" addressed in 9 VAC 10-20-150.

**Agency Response:** The Board's original intention was that these kinds of activities should be routinely exempted. Furthermore, these are specific buffer exemptions, which are different from the more general exemptions (from all program requirements) listed in Section 150. Therefore, CBLAD staff recommend no further changes in response to these comments.

**9 VAC 10-20-130.3**

*Buffer*

**Comments:** We had several hundred commenters, either individuals or organizations, stating support for the proposed tightening of the buffer criteria to close loopholes and Aput teeth into the regulations. Some stated that the Board should allow no exceptions to the 100-foot buffer. Others stated the following variations on these themes:

a. The proposed changes are really only clarifications that appear to be reasonable and simply reflect what has always been the Board's intent;
b. That the 100-foot buffer requirement was originally a compromise, where the Board struck a balance among issues such as property rights, economic development needs and projections, and the need to protect the Bay and its sensitive water-related resources;
c. The 100-foot buffer requirement is an appropriate protection measure for sensitive RPA lands and is scientifically defensible;
d. A local government official stated that the requirement has not deterred development;
e. Adoption should not be unnecessarily delayed;
f. The most significant problem with the Bay Act program has been the misinterpretation and misuse of the existing buffer requirements.
g. There is considerable concern that the BMPs installed to provide equivalent water quality protection when buffer encroachment is allowed are not typically maintained well B especially if they are on residential lots B and cease to function after a short time, resulting in degraded water quality. Local governments are not typically aggressive about overseeing proper maintenance of stormwater management facilities.

Other commenters, in support of the proposed changes to the buffer criteria, pointed to political statements or decision that line up with these requirements, such as the following:

a. Governor Gilmore has promised to protect our wetlands, and buffers are critical to providing that protection;
b. Restoring and protecting buffers is identified as a critical priority in the Elizabeth River Watershed Action Plan, and this plan was adopted by the Commonwealth in 1996 as its Regional Action Plan for a Toxic Region of Concern;

c. Preservation, maintenance and restoration of the 100-foot RPA buffer is essential if we are to achieve the Chesapeake Bay Program Directive to establish 2010 miles of shoreline buffers by the year 2010.

**Agency Response: This support is acknowledged and will be communicated to the Board.**

**Comments:** Some commenters stated that buffers should always be forested and, where they are not forested, they should be reforested by either planting appropriate trees or allowing natural regeneration to occur. Others went further, stating that the buffer land should be absolutely chemical free.

**Agency Response:** While the benefits of forested buffers are well recognized, the Board has never gone so far as to require them in every case, and certainly not retroactively for buffer areas that did not have trees when the program began. CBLAD staff recommends no further changes in response to these comments.

**Comment:** A number of commenters complained that agricultural and silvicultural activities appear to be exempt from the regulations or, at least, given much more flexibility than development projects regarding allowed buffer encroachments, and that this is not fair. Some of these asked the agency to provide the scientific basis that demonstrates the different treatments are reasonable in view of water quality protection. Others expressed the view that if the additional flexibility for agricultural and silvicultural uses is based on the implementation of "equivalent" water quality protection BMPs, then the same flexibility should be extended to development projects.

**Agency Response:** Agricultural and silvicultural land uses are undertaken to produce income from the sale of the crops grown each year or over some extended period of time. Farmers, in particular, have little control over the selling prices of their crops and therefore rely on their ability to use as much of their land as is feasible for growing crops. Agricultural uses do have to comply with a full soil and water conservation plan if the agricultural activity is to be permitted to occur to within 25 feet of the other RPA feature. In order to be able to farm within the landward 50 feet of the buffer area, there must be agricultural water quality best management practices in place on the adjacent farm field. The original Board was presented evidence (calculations) that implementation of appropriate agricultural BMPs could exceed the pollution reductions of the 100 foot buffer by itself. Silvicultural activities are only exempted when they comply with their own set of BMPs. Both silvicultural and agricultural activities are ongoing, renewable economic activities with strong supportive lobby groups. The primary difference in these activities and home construction is that home construction is permanent, while silviculture, if correctly undertaken, is a renewable resource and the disturbance to the land and existing vegetative cover should be limited in time. Likewise, agricultural activities do not result in permanent impervious coverage. The Department recognizes the fact that agricultural and silvicultural activities are not subject to the same level of scrutiny as new construction and development. However, these issues have repercussions far beyond the scope of the Bay Act. In view of these differences, the Board made a decision when adopting the original regulations to have slightly different buffer modification requirements for agricultural and silvicultural activities than apply to development, based on reasons other than science. In view of these facts, CBLAD staff recommends no further changes in response to these comments.

**Comments:** Some citizens expressed concerns about the potential impact of the buffer criteria changes on their ability to effectively develop their lots or land in general. A number of commenters were confused about the application of the changes, fearing they would apply to older, smaller lots currently grandfathered. Some feel the Board needs to clarify that

reasonable waivers can be allowed in older subdivisions, but agreed that the 100-foot buffer should be required and enforced for all new developments.

**Agency Response:** These fears are unfounded. The Board did not change or remove the original grandfathering language, which still applies as needed to pre-1989 lots.

**Comments:** The building industry, some citizens, and some localities expressed the view that the proposed changes are a significant change of policy and that alternative measures, such as stormwater management BMPs and wetlands restoration, can provide equivalent or better water quality protection while still allowing reasonable encroachment into the buffer, and that local governments should be allowed discretion to approve such encroachment, conditioned on the use of proven equivalent measures. Some commenters, including the building industry, commented that the proposed changes will inhibit "smart growth" and infill development, and drive up development costs or encourage development to "sprawl" out to less expensive, more rural lands. On the other hand, they argue that continued buffer flexibility will serve as an incentive for infill development and can result in broader water quality benefits. In general, they oppose the removal of buffer equivalency language allowing 50 foot buffers along with appropriate water quality BMPs.

**Agency Response:** The Department concurs that impacts to resources and associated buffers to protect those resources can often be mitigated or offset through the implementation of innovative practices or treatment technologies, although this does not obviate the need to provide adequate protection of those resources. Furthermore, studies conducted in Maryland, Delaware and elsewhere indicate the majority of engineering mitigation practices are not effectively maintained and cease to function properly within a few years after installation. The requirements to mitigate encroachments into the Resource Protection Area are determined through the local administrative process to permit such modifications. CBLAD has provided guidance in the past for the determination and mitigation of the pollutant removal capacity of the buffer when an encroachment becomes necessary (exceptions and modifications). The Board has allowed a large degree of local flexibility in determining the approach to mitigation of buffer encroachments (based on sound science and recognizing the relative benefit of a buffer in the given watershed). The pollutant removal efficacy of the buffer can often be replaced or offset through the use of innovative site design practices, the implementation of on-site or off-site best management practices, provision of additional buffering and restoration of ineffective buffers to provide for water quality protection, and increases in buffers in other areas to offset buffer modification (buffer averaging). However, the Board has consistently interpreted that their intention is that <u>new</u> subdivisions be platted and developed so that each lot is large enough to build on without the need for buffer encroachments. The exception process is available for situations where this requirement cannot be met practically. Depending on the outcome of the regulatory changes, the Department will likely provide additional guidance for mitigating the buffer in these various ways.

While the proposed regulatory amendments remove the specifically identified buffer equivalency language from the Regulations, developers and others retain the option of requesting development-wide buffer encroachments through the local exception review process. As part of any approval for such development-wide encroachments, buffer equivalency will be considered, through the evaluation of a Water Quality Impact Assessment.

The purpose behind the proposed regulatory changes pertaining to buffer areas is to provide clarity on the Department and Board's intent regarding buffer area requirements. The Department has consistently provided its interpretation of the equivalency subsection to local governments since 1992, through the development and distribution of Information Bulletin 10, and through buffer interpretation letters to 19 different local governments. The general interpretation of Information Bulletin 10, and the buffer interpretation letters is that the buffer is the landward component of a Resource Protection Area, and as such, development is limited to those activities specified as permitted under § 9 VAC10-20-130 of the Regulations. The designation criteria outlined in § 9VAC10-20-80.B.5 clearly require the buffer area to be both 100 feet in width and to be the landward component of the RPA. As development within the RPA, including the buffer component is limited to certain activities, such as redevelopment and water dependent facilities, the buffer equivalency provision applies to the permitted encroachments and modifications that are outlined in subsequent sections of the Regulations (§ 9 VAC10-20-130.B.1-4 of the existing Regulations). The amendments to the buffer requirements are intended to clarify the buffer requirements as presented by the Department and Board through general information sources such as Information Bulletin 10 and through specific local interpretation letters provided since 1992.

Should the buffer equivalency language be reinserted into the Regulations, the Department recommends that specific standards be included to ensure that the remaining undisturbed buffer be protected from any disturbances, that the approval of any equivalent buffer area be contingent upon receipt, review and approval of a Water Quality Impact Assessment, that the mitigation proposed by the applicant include minimizing the need for construction activities in the RPA, including the buffer component and that water quality BMPs, in conjunction with enhanced buffer vegetation plantings, be used for equivalency rather than only relying on BMPs for equivalency. However, Department staff recommends that no further changes be made in response to this comment.

**Comment:** The building industry expressed a concern that by stating in the regulations that "the buffer area is never reduced" – even though the same sentence refers to possible modifications, encroachments, etc. – the Board is at least sending a mixed message that may result in some local governments deducing that the Board does not intend for modifications and encroachments to be granted at all, or that the standards for such flexibility will go far beyond reasonableness. They recommend that the Board revise this language to state the intention using less extreme terms.

**Agency Response:** The buffer equivalency language was never intended to support the no tion that the buffer itself could be reduced, but rather it was intended to set forth the performance standard that must be met by any buffer modification or encroachment. The Regulations, as they are currently written (see § 9 VAC10-20-80.B.5), make it clear that the buffer is the landward component of the Resource Protection Area and that it is to be 100 feet in width. There are provisions in the current and proposed Regulations that, under certain circumstances, development activities may occur in portions of that 100-foot width by right. But neither the current nor proposed Regulations permit the buffer area to be reduced; the designation criteria outlined in § 9 VAC10-20-80.B.5 should override any permitted disturbances or removal of vegetation in or from the buffer. Finally, the Regulations continue to permit any property owner to apply for exceptions to the provisions of the Regulations. Therefore, staff recommends that the word "never" be retained.

**Comments:** The building industry commented that their needs to be some mechanism available whereby hardship cases can be granted variances allowing less than 100 feet of buffer, with the use of environmentally sound building practices,

but that approval of all proposed buffer encroachments should not be forced through the formal local exceptions process. Numerous commenters stated that the exceptions process should not be required to be conducted by the local Board of Zoning Appeals, fearing that BZA decisions would be more politicized and that an even greater number of exceptions would likely be authorized.

**Agency Response:** The regulations provide for an local exceptions process so local governments can take into account hardship cases and special circumstances. Further revisions are being proposed in several sections to make it clear that localities do not have to use their BZAs to review and rule on these exceptions. However, it is clear from past practice in some localities that this provision has been incorrectly interpreted, even after the proper interpretation was provided, and that the formal exceptions process is the only way to assure that buffer encroachments are only allowed when absolutely necessary and that appropriate mitigation is provided in those cases. Further revisions are also being proposed to the language in 9 VAC 10-20-150.C pertaining to the Exceptions Process, to provide for greater and reasonable flexibility. Therefore, staff recommends no further changes in response to this comment.

**Comment:** Property rights should permit any size house, in any location preferred by property owner.

**Agency Response:** The right for local governments to restrict house size and location was established some years ago with the advent of zoning requirements. The restriction on house size or location under these regulations has not changed since their original adoption in 1989. Property owners retain the right to apply for variances or exceptions from these regulations under 9 VAC10-20-150.C, and each local government currently has a process for reviewing such requests in place. Staff recommends no further changes in response to this comment.

**Comments:** When the agricultural of forest operations that allowed removal of vegetation from the buffer cease to operate, thus removing the basis for the encroachment, the buffer should have to be restored. This is particularly relevant when former agricultural or forested land is then considered for development

**Agency Response:** Staff concurs with this point and suggests the following language to accommodate it.

**Text as initially recommended for change:**

9VAC 10-20-130.3 (formerly (B) is the section that deals with equivalency. Most of the language was relocated and the equivalency provision was stricken. There may be additional changes in the format of the remaining text. Thus, the original text is not shown at this time.

**Text as now recommended for change:**

9VAC 10-20-130.3 Buffer Area Requirements (add the following)
*b. Where land uses such as agriculture or silviculture within the area of the buffer cease and the lands are proposed to be converted to other uses, the full 100-foot wide buffer shall be reestablished. In reestablishing the buffer,*

*management measures shall be undertaken to provide woody vegetation that assures the buffer functions set forth in this chapter.*

**Comment:** Changing the buffer requirement to a rigid 100-foot width will mean that older and for the most part, smaller, lots along waterfront areas will not be able to be built upon.

**Agency Response:** Lots that were recorded prior to October 1, 1989 and which do not have sufficient land area outside of the RPA for the placement of a principle structure and necessary utilities continue to have permitted encroachments to within 50 feet of the stream, or other RPA component, subject to the plan of development review process at the local government and compliance with the general performance criteria. This provision has always been in these regulations and is not being changed. Other lots that were recorded after the October 1, 1989 date, but prior to adoption of a local Bay Act ordinance have also been considered by some localities as enjoying some vesting, with respect to the full application of the RPA and general performance criteria. Finally, no matter when a lot or parcel was recorded, a property owner always has the opportunity to apply for a variance or exception for the purpose of building a principle structure and necessary utilities. It is unlikely that a local government would deny a property owner any use of their property.

**Comment:** BMPs in lieu of buffer areas are better for water quality because they are designed for a specific reduction, and not all buffers function in the same way.

**Agency Response:** The buffer component of the RPA was never intended to be a BMP, rather it's intended functions are to retard runoff, prevent erosion and filter nonpoint source pollution. The Department does recognize that buffers do provide for different levels of water quality protection and improvement, depending on the soils, the slope, their width, and the type and amount of vegetation. However, the Regulations, in their current and proposed form also require that ". . . a 100-foot buffer . . . shall be retained if present and established where it does not exist." The buffer is intended to provide for a physical barrier and protect the other components of the RPA, as evidenced by the definition of the buffer in the Regulations as ". . . an area of natural or established vegetation managed to protect other components of a Resource Protection Area and state waters from significant degradation due to land disturbances." The basic language relating to the buffer area has not been amended in the proposed Regulations. A developer or property owner can petition the local government for site-specific buffer encroachments through the exception process and use of a BMP to compensate for the buffer encroachment, if approved, will still be important in the overall water quality program at the local level. The intent behind the clarification of the buffer language was to continue to permit site-specific encroachments through a local exception process including the review of a Water Quality Impact Assessment to ensure that any BMPs or other mitigation proposals adequately compensated for the reduced buffer functions. The Department has heard that individual lot BMPs often do not function to their design capacity due to lack of maintenance by property owners, proper placement by builders, and other factors. While development-wide BMPs may provide for pollutant removal, most localities have reported difficulties in ongoing maintenance activities and often have been required to perform the maintenance themselves, at considerable cost and personnel time. As the buffer is defined as more than a water quality BMP, the use of BMPs as the sole compensatory measure for encroachments is not adequate to fully mitigate for the loss of function.

**Comment:** Buffers in flat areas do not filter pollution because water does not run through them, conversely, drainage patterns which flow away from buffers mean the buffer is not necessary for water quality protection.

**Agency Response:** Buffers in flat areas do perform water quality protection function even if the water from the surrounding area does not flow through them. Water from rain events does fall on the buffer itself, and is filtered prior to its introduction into the water table or other groundwater aquifer. It is also important to note that vegetated buffer areas which include trees, also filter groundwater prior to its introduction into the surface water system. Finally, the buffer, as it is currently defined and as its functions are currently noted in the existing Regulations, is intended to retard runoff, prevent erosion and filter nonpoint source pollution. The reliance on the filtering capacity of the buffer leads one to assume that the primary function of the buffer is to act as an additional BMP, primarily because its other functions cannot be readily measured and therefore, compensated for. However, the buffer, by its existence adjacent to more sensitive land features or surface water, does provide for protection above and beyond its ability to filter runoff.

**Comments:** Buffers do not make sense in highly urban areas and should not be required in these areas.

**Agency Response:** Buffers, as the landward component of the RPA, are required to be designated as such in highly urban areas. However, it is important to separate the difference between designation of the buffer area as the landward component of the RPA, and the requirements in the Regulations as they pertain to permitted activities and vegetation requirements. The Department concurs that in highly urban areas, vegetated buffers may not make economic or water quality sense, as oftentimes, the stormwater is piped through the buffer area or treated as a whole through other means. The current and proposed Regulations permit the designation of Intensely Developed Areas (IDAs) for areas of localities where little of the natural environment remains. IDAs are required to be reviewed and approved by the Local Assistance Board, but within IDAs, the imposition of a vegetated buffer area may not be required. IDAs are overlays to the RPA/RMA designation, and the only performance criteria that are required in these areas relates to the redevelopment criteria. As the existing and proposed Regulations already include flexibility for urban areas with respect to the vegetated buffer requirements, the Department is of the opinion that no further regulatory amendments need to be included.

**9 VAC 10-20-130.4**

*Buffer*

**Comment:** One locality recommended that the Board add a paragraph "d" saying: "Pools and decks may be permitted in the landward 50 feet of the buffer subject to the requirements of a, b, c above and the following additional requirements: (1) All runoff from pools and decks shall be treated in an approved structural BMP; (2) The seaward 50 feet of the remaining buffer shall be replanted with approved natural vegetation. The area of this replanting shall be two [2] times the area of the pool and deck."

**Agency Response:** This subject matter is addressed in revisions made to 9VAC 10-20-150, specifically new subsection 3.d which allows consideration of encroachments for additions through an administrative process (please go to the referenced section for the complete text change). This change is responsive the James City County request; however, the Department does not support further encroachment authority for accessory structures, including pools. Accessory

structures and pools would still be prohibited within RPAs/buffers generally and be allowable only through the exception process.

**Comment:** Several localities requested the Board to amend this subsection to say that encroachments into the buffer may be allowed "subject to approval by the local government.."

**Agency Response:** Encroachments are already subject to approval by local governments. This does not need to be further stated in the regulations.

**Comments:** Several commenters supported further clarification regarding limits on buffer encroachments for lots created prior to the Bay Act, to reduce abuses. One commenter said he considers it appropriate to provide reasonable waivers regarding buffers in older subdivisions, but he agrees that the 100-foot wide buffer should be enforced for all new developments. One commenter considers the proposed amendments to completely invalidate grandfathering of lots platted prior to the regulations. Another commenter asked for clarification on whether the proposed revised language is meant to include the pre-October 1989 facilities, as approved, by right. He recommended that a mechanism should be provided for local approval of modifications for older lots. Several commenters noted that the October 1, 1989 date pertaining to grandfathered lots is arbitrary, since many local programs were adopted years later. This commenter felt the Board should provide flexibility to allow the date to change based on when the parcel was first identified as being in an RPA on the official RPA map. This would allow localities to consider changes in their original RPA designations while accommodating property rights.

**Agency Response:** As noted above, The October 1, 1989 date was included in the original regulations and hs not been changed. Some local programs, rather than include this date, included the date the local Bay Act ordinance was adopted as the "vesting" date for lots. However, it is important to note that no matter when a lot or parcel was recorded, if it can comply with the full set of requirements in the regulations, particularly those that pertain to the reserve drainfield and buffer area, the owners must comply. The October 1, 1989 date was included to give local governments notice to carefully review subdivisions for compliance as early as possible so as to not continue to create lots that then must be granted variances or exceptions in order for development to occur. Staff is not supportive of allowing the broad flexibility to suggested in the comment about floating grandfathering dates. This would create as many or more problems as it might solve. However, staff recognizes that some further clarification of the original grandfathering language would be useful.

**Text as initially recommended for change:**

The general subject of clarifying the buffer encroachment issue and the wording of the grandfathered lots subsection is addressed in the initial recommendations. Those changes, along with the new subsection, are shown below.

**Text as now recommended for change:**

4. Permitted encroachments into the buffer area.

a. When the application of the buffer area would result in the loss of a buildable area on a lot or parcel recorded prior to October 1, 1989 ~~modifications to the width of~~ *encroachments into* the buffer area may be allowed*, through an administrative process*, in accordance with the following criteria:

(1) ~~Modifications to~~ *Encroachments into* the buffer shall be the minimum necessary to achieve a reasonable buildable area for a principal structure and necessary utilities.

(2) Where ~~possible~~ *practicable, an a vegetated* area *that will maximize water quality protection, mitigate the effects of the buffer encroachment, and is* equal to the area ~~encroaching~~ *of encroachment into* the buffer area shall be established elsewhere on the lot or parcel ~~in a way to maximize water quality protection~~.

(3) ~~In no case shall the reduced portion of the buffer area be less that 50 feet in width. Regarding the provision of this subsection, the~~ *The encroachment may not extend into the seaward 50 feet of the buffer area.*

**Comments:** Some requested that if the Board decides to adopt a rigid or strict 100-foot buffer requirement, the requirement should not be retroactive to existing projects approved in good faith by local governments. Some suggested that additions or modifications to such projects that had been approved earlier should be allowed unless the locality makes a finding that negative water quality impacts will result. Others asked that the Board establish a new grandfathering period, between the original one of October 1, 1989 and the effective date of these amendments, to protect the vested rights of plats approved in good faith by the localities during the intervening time. A few stated the second date should be no sooner than July 1, 2001, in order to prevent another rush of development applications by landowners trying to beat the deadline. Localities are concerned that, without such a provision, they are likely to incur a significant amount of litigation.

Agency Response: CBLAD staff concur that a second grandfathering (or amnesy) period may be appropriate, in order to assure property owners their vested rights are protected and to minimize the risk of litigation over these issues. Furthermore, section 10.1-2114 of the Bay Act states that the Board may not act in a way that negatively affects vested rights.

**Text as now recommended for change:**

9 VAC 10-20-130.4

*b. When the application of the buffer area would result in the loss of a buildable area on a lot or parcel recorded between October 1, 1989 and September 1, 2001, encroachments into the buffer area may be allowed through an administrative process, in accordance with the following criteria:*

*(1) The lot or parcel was created as a result of a legal process conducted in conformity with the local government's subdivision regulations;*

*(2) Conditions or mitigation measures imposed through a previously approved exception shall be met;*

*(3) If the use of a best management practice (BMP) was previously required, the BMP shall be evaluated to determine if it continues to function effectively and, if necessary, the BMP shall be re-established or repaired and maintained as required; and,*

*(4) The criteria in 9VAC 10-20-130.4.a. be met.*

**9VAC-10-20-130.4.a**

*Buffer*

**Comment:** Some commenters stated that the Board needs to clarify what they mean by the term "reasonable buildable area".

**Agency Response**: Consideration of what is reasonable or even buildable may vary from site to site, depending upon the unique circumstances at each site and what the owner proposes to build. That is why this determination is left up to the local governments. Staff recommends no further changes in response to this comment.

**9 VAC 10-20-130.4.b**

*Buffer*

**Comments:** Several commenters stated that this subsection should be further amended to say that the vegetation established elsewhere on the lot or parcel should, preferably, be located in the seaward 50 feet of the remaining buffer. Another commenter noted that the Board should allow reliance on larger woody shrubs, wetland-type vegetation, and other fast-growing plants know to absorb nutrients from groundwater, rather than just small, slow-growing trees as replacement vegetation where buffer encroachment is allowed. One County noted that it is not clear whether this language refers to both residential and commercial encroachments, or to residential encroachments only.

**Agency Response:** The requirement pertains to all development. Staff is reluctant to recommend such specificity because such judgements are very site-specific and, therefore, should be left to the local government to make. Therefore, CBLAD staff recommends no further changes in response to these comments.

**9VAC10-20-130.5.a**

*Buffer*

**Comment:** Waterfront property is more costly and houses should be closer to the water because people are paying more for views and proximity to the water feature.

**Agency Response:** The regulations, as they pertain to the removal of vegetation for the purposes of establishing views, vistas and site lines have not been changed. The sole change is the renumbering of this section and the clarification that the buffer area for these types of vegetation removal is to be considered buffer modifications.

**Comment:** A few commenters noted that the permitted modifications to the buffer area are problematic to enforce because of their vagueness and, since this language was merely moved but not changed, the proposed regulations do

nothing to clarify the meaning of this subsection. The commenters feel that these kinds of modifications should no longer be allowed because of the many cases where landowners have used the language as a loophole, resulting in significant clearing of buffer areas, compromising the effectiveness of the buffers. If still allowed, the commenters recommend that the regulations should specify that no more than a certain percentage (e.g., 5%) of clearing be allowed. They also recommended that any vegetation cut or removed from the buffer should be replaced with trees or woody shrubs of equal function elsewhere on the site.

James City County recommended that the Board revise the list of permitted modifications to the buffer to clarify that only approved BMPs are permitted in the buffer. The County is finding that this subsection is not enforceable except in cases of the most blatant violations with massive buffer clearing. Several local governments recommend that the Board amend this subsection to require that these modifications can be made only after receiving local government approval and consistent with local guidelines, not solely at the discretion of the landowner. Requiring prior local government approval would significantly reduce or even eliminate the abuses, while assuring landowners of appropriate flexibility.

**Agency Response:** Staff supports the inclusion of this language. It reiterates the need for local review of the proposed buffer modification and will make enforcement activities easier to manage since the existing language does not explicitly set out that local approval is required prior to the modification.

**Text as initially recommended for change:**

[Note: because the section was relocated, it is shown as all new text in the proposal even though there were some specific changes. For clarity only the changes in subsection "a" are shown below.]

9 VAC 10-20-130 ~~Performance~~ *Use and develoment* criteria for Resource Protection Areas.

9 VAC 10-20-130.*5 Permitted modifications of the buffer area.*

a. In order to maintain the functional value of the buffer area, ~~indigenous~~ *existing* vegetation may be removed only to provide for reasonable sight lines, access paths, general woodlot management, and best management practices*, including those that prevent upland erosion and concentrated flows of stormwater*, as follows:

[(1) through (4) follow]

**Text as now recommended for change:**

[Showing changes only to the proposal and not the original language of this subsection.]

9 VAC 10-20-130 ~~Performance~~ *Use and develoment* criteria for Resource Protection Areas.

9 VAC 10-20-130.*5 Permitted modifications of the buffer area.*

a. *In order to maintain the functional value of the buffer area, ~~indigenous~~ existing vegetation may, subject to approval by the locality, be removed only to provide for reasonable sight lines, access paths, general woodlot management, and best management practices, including those that prevent upland erosion and concentrated flows of stormwater, as follows:*

[(1) through (4) follow]

**9 VAC 10-20-130.5.a.(1)**

*Buffer*

**Comments:** Several commenters stated that the flexibility allowed here is too broad to protect buffers. They recommend that no tree should be removed unless it is an invasive species, dead, or diseased beyond saving, and that pruning should be limited to a small percentage of the tree's limbs. Some commenters asked that the Board clarify what constitutes a reasonable sight line or vista and provided specific evaluation criteria in the regulations. One commenter recommended that the Board replace “equally effective” with “effective,” noting that it is not always possible to provide equal protection.

**Agency Response:** Staff believes the addition, noted above, of language requiring local government approval of such changes is sufficient and recommends against providing too many prescriptive standards in the regulations. Given the authority for final approval, localities should have some discretion in making such decisions. Therefore, staff recommends no further changes in response to these comments.

**9 AC 10-20-130.5.a.(3)**

*Buffer*

**Comments:** Several localities commented that this is too broad an exemption. They noted that entire buffers can be cleared under the guise of silvicultural thinning – which is geared more toward managing forests to optimize value of timber harvests,than maintaining functioning riparian buffers – or the removal of noxious plants, since many flood plains contain such vegetation. A number of commenters asked the Board to define the term "silvicultural thinning," stating that the vagueness of the meaning of this term has been used by some to justify clearing the buffer. A number of commenters stated that the regulations should severely limit or restrict removal of dead/diseased trees/shrubs and removal of noxious weeds or any other vegetation from the buffer; if still allowed, the regulations should require replacement by vegetation equal in function, as is required with the provision about site lines and vistas. Furthermore, the localities stated that these activities should not be allowed solely at the discretion of the landowner, but that local governments should have the approval authority for such activities. The commenters state that the locality should have the authority to publish its own list of noxious weeds and invasive species, which would then be included in the allowance for eradication, and not have to rely on a state-generated list of species. They noted that one way to address the abuses of this language would be to break this paragraph into two sections, one dealing with removal of objectionable vegetation, and the other dealing with silvicultural thinning. For example, the first section could say "Dead, diseased, or dying trees or shrubbery and noxious weeds . . . may, subject to approval of the local government, be removed." They recommend deleting the remainder of the paragraph and creating a second paragraph to say "Silvicultural thinning, but not clear cutting, may be conducted in

the RPA buffer on parcels of land larger than three three (3) acres in accordance with Virginia Department of Forestry Regulations."

**Agency Response:** The Department supports inclusion of the language that explicitly states the need for locally adopted standards and for a professional recommendation about the need for thinning. While the Department supports the local approval requirement, that item is already addressed in the proposed changes to Section "a" of which "3" is a part. Also, the new definition for silviculture establishes a threshold of 20 acres for such activities thus a conflict arises with the reference to a three-acre threshold. Language addressing this latter item is proposed below.

**Text as initially recommended for change:**

[Note: because the section was relocated, it is shown as all new text in the proposal even though there were some specific changes. For clarity only the changes in subsection "a" are shown below.]

(3) Dead, diseased, or dying trees or shrubbery and noxious weeds (such as Johnson grass, kudzu, and multiflora rose) may be removed at the discretion of the landowner and silvicultural thinning may be conducted based upon the recommendation of a professional forester or arborist.

**Text as now recommended for change:**

[Showing changes only to the proposal and not the original language of this subsection.]

9 VAC 10-20-130 ~~Performance~~ Use and development criteria for Resource Protection Areas.

9 VAC 10-20-130.5 Permitted modifications of the buffer area.

*a. In order to maintain the functional value of the buffer area, existing vegetation may be removed, subject to approval by the locality, only to provide for reasonable sight lines, access paths, general woodlot management, and best management practices, including those that prevent upland erosion and concentrated flows of stormwater, as follows:*

(3) Dead, diseased, or dying trees or shrubbery and noxious weeds (such as Johnson grass, kudzu, and multiflora rose) may be removed ~~at the discretion of the landowner and silvicultural thinning may be conducted based upon the recommendation of a professional forester or arborist~~ *and thinning of trees may be allowed, pursuant to sound horticultural practice incorporated into locally-adopted standards*.

**9 VAC 10-20-130.5.a.(4)**

*Buffer*

**Comment:** Some commenters stated that the regulations should make it clear in this subsection that it is acceptable to allow the removal of trees and grading the river bank to a flatter slope to accomplish shoreline erosion control, consistent with the best technical advice. They believe that shoreline erosion control is necessary and tree replacement for these types of projects makes no sense

**Agency Response:** The regulations do make it clear that shoreline erosion control projects are permissible within the RPA/buffer, consistent with the best available technical advice. Shoreline erosion control is necessary in many cases to address shoreline erosion problems. While the Regulations do not require the replacement of trees for shoreline erosion control projects, neither do they permit for all trees in along a shoreline to be removed without cause. Shoreline erosion control projects should be undertaken consistent with the best technical advice, appropriate approvals of the local wetlands boards and local governments. When trees are removed for shoreline erosion control projects, other vegetation that is equally effective in reducing runoff, preventing erosion and filtering nonpoint source pollution should be planted to compensate for the loss of trees.

**Comment:** Some commenters stated that the regulations should provide more guidance in this subsection and, ideally, restrict the clearing of vegetation for the securing of shorelines with riprap to reduce unnecessary shoreline hardening. They further stated that, where woody vegetation is removed to accomplish shoreline erosion control, it should be required to be replaced with other woody vegetation equal in function (could be woody shrubs, instead of trees) to prevent fertilized turf establishment to the water's edge. Others commented that the replacement vegetation should be a mix of grasses, understory shrubs and trees, which will remove more pollution and infiltrate water better. Turf/lawns on graded/flattened shoreline erosion projects just add pollution from fertilizers routinely applied as part of the more intensive management of the lawns. One commenter stated that allowing buffer clearing for shoreline erosion control is shortsighted. He stated that the woody vegetation is performing valuable functions, even if there is gradual erosion that brings down a tree every now and then. He stated that to take out an entire shoreline of trees and shrubs seems extremely destructive, especially considering how long it will take for mature vegetation to be reestablished on the site.

**Agency Response:** Shoreline erosion control is a field that reflects significant differences of opinion scientifically among professional practicioners about the best and most appropriate techniques for solving some acute problems. CBLAD has published guidance stating general preferences for “soft” (vegetative) solutions wherever feasible and reestablishment at least of appropriate woody shrub vegetation on graded banks, rather than high maintenance turfgrasses. However, given the continuing evolution of this science, staff is reluctant to recommend that the regulations be made overly prescriptive on this matter. Staff recommends that the Board continue to condition this kind of modification on “the best available technical advice and applicable permit conditions or requirements.”

**Comment:** One commenter stated that CBLAD should be officially involved in the review of all shoreline permit applications, just as VDOT, DGIF, DEQ, DCR, and Corps of Engineers and VIMS are involved in this oversight through the joint permit process.

**Agency Response:** Acknowledged. CBLAD staff are once again becoming involved in the State's Joint Permitting Process.

### 9 VAC 10-20-130.5.b

*Agriculture*

**Comments:** A number of agricultural interests commented that farmers need to be able to continue to encroach in the buffer down to 25 or 50 feet for production purposes, but these encroachments are accomplished using BMPS that achieve water quality equivalent to or even better than that provided by the 100-foot buffer. Some noted that implementation of agricultural BMPs may become more successful if landowners have more alternatives, such as transferring manure off-site to regional composting facilities rather than building a manure storage building on-site.

**Agency Response:** The proposed regulation amendments continue to allow farmers to encroach into buffers for production purposes, as long as BMPS are employed that achieve water quality equivalent to or even better than that provided by the 100-foot buffer. The Board and Department have control over what new pollution preventing techniques are made available to the industry, but staff are involved in the inter-agency committees that discuss these matters and make such decisions.

**Comments:** Several comenters noted that the regulations do not reflect the division of regulatory authority between localities and state agencies, (e.g. agriculture is exempt from E&S, and yet it is a big contributor to NPS pollution). They commented that increasing or toughening of requirements related to land development and urban areas is not consistent with continued allowances for agriculture, especially given the perception of weak program assistance and enforcement mechanisms for agriculture. For example, a number of commenters pointed out that agricultural buffer flexibilities are inconsistent with those for non-agricultural activities, such as land development. A number of commenters noted that the regulations do not restrict certain activities, such as fertilizing lawns or agricultural fields that go to the edge of the water. One pointed out that Tabb's Creek is condemned for oyster harvests due to pollution resulting from cattle grazing along the shoreline and getting into the stream. These commenters ask if we really want to allow nutrients, pesticides, and animal waste to be applied within 25 feet of the shoreline?

**Agency Response:** The regulations require existing buffers, whether trees or herbaceous, to be maintained in a condition that prevents erosion and filters runoff of pollution. CBLAD discourages farmers from allowing livestock to grace down to the edge of streams or within them, but the agricultural conservation agencies in Virginia have not yet developed any prohibitions against this. The Board's NOIRA did not include any objectives related to making the regulations of agricultural activities more stringent at this time, so they cannot include such a prohibition in these amendments. However, in response to the many public comments of this nature, the Board has made it that they intend to monitor agricultural water quality issues more closely in the future. Thus, staff recommends no further changes in repsponse to these comments.

### 9 VAC 10-20-130.5.b.(1) and (2)

*Agriculture*

**Comment:** A few commenters support the soil test requirement for nutrient management plans. Others felt that requiring a soil test for a nutrient management plan to be developed may prove to be a disincentive unless the soil tests are free.

**Agency Response:** The Nutrient Management and Certification regulations require soil test as part of a certified nutrient management plan. Those regulations only require soil test once per three years. Most cash grain producers actually take soil tests on an annual basis. During the Regulatory Advisory Committee process to develop the proposed amendment language, representatives of Soil and Water Districts, the Virginia Farm Bureau and the Virginia Agribusiness Council admitted and agreed even at a cost, taking regular soil tests to develop Nutrient Management Plans for farms actually results in a net profit for the farmer, due to the resulting lower fertilizer application rates (and associated costs) and improved crop yields (higher profits). Staff recommends no further changes in response to this comment.

**Comment:** It is unclear what standards would be used if BMPs that are not cost-shared are being implemented on the tract. This could lead to inconsistent standards for agricultural BMPs. Recommends to remove the language "are implemented with financial assistance from federal or state [funds]".

**Agency Response:** As BMPs gain acceptance from the agricultural community, and become more widely used, the Commonwealth typically removes them from the cost share list. Nevertheless, such practices, and their standards, remain effective in reducing NPS pollution and should be part of any SWQCP that is developed. Regarding the selection of particular BMPs, such choices are left to the local SWCD staff, the SWCD Board, and their local partners. These professionals reference the same sources of standards for both cost-shared and non-subsidized BMPs. Therefore, CBLAD staff recommend no further changes in response to this comment.

**Comment:** DCR requested that their nutrient management regulation be referenced instead of the "Standards and Criteria" guidance document.

The Commissioner of Agriculture commended the Board on the improvements in the agricultural criteria and the attempt to provide enforcement in a manner consistent with the procedures followed in the Agricultural Stewardship Act and associated regulations. VDACS offered assistance and cooperation in implementing any portions of amendments pertaining to the Agricultural Stewardship Act. VDACS staff also noted that if the Board wants to mirror the Agricultural Stewardship Act guidelines for enforcement, the Commissioner of Agriculture has some flexibility regarding one deadline, and other changes could occur over time.

On the other hand, some farmers commented that problems on agricultural land should be addressed and the requirements enforced by the local SWCD through the DCR, because of their expertise and standing with the agricultural community. A few commenters requested that the Board not focus on enforcement of buffer provisions so much that it loses sight of other upland problems regarding improper or missing implementation of agricultural BMPs. CBF objected to the added enforcement provisions, as drafted, because they appear to be exclusive. They recommend that this be changed to acknowledge the Board's enforcement authority if local enforcement is inadequate. Some commenters noted that references to local enforcement, the SWCD, and the Virginia Agricultural Stewardship Act are confusing in terms of which entity should pursue a violation initially and what process to follow. These commenters view that VDACS is responsible for agricultural enforcement.

Several commenters fully support the buffer encroachment requirements and the need to correct specific water quality problems, but they are not supportive of the process put forward in the amendments to accomplish this. Furthermore, a number of Soil and Water Conservation Districts expressed concern regarding SWCDs being perceived as regulatory agencies. They commented that SWCDs are not the appropriate agencies to enforce water quality protection at agricultural activities. SWCDs have always played an advisory role to landowners and operators who voluntarily agree to use BMPs on their land. They fear that getting SWCD staff involved in enforcement may undermine their efforts to get farmers to cooperate in getting farm conservation plans developed. They comment that enforcement of agricultural requirements is the proper role for the local government, CBLAD or VDACS. However, the localities believe the enforcement should be conducted by VDACS through the Agricultural Stewardship Act, which provides the needed legal remedies and enforcement for serious pollution problems. If the Board moves forward with this amendment, it needs to work with local SWCDs and local governments to come to consensus on how to administer these provisions. The regulations need to remove existing confusion and clearly set forth the expectations of the various governmental entities.

**Agency Response:** Staff acknowledges the DCR comment and recommends the reference be changed. Staff also recommends some reformatting of this Section for ease of reading and use and to clarify the criteria in light of some of the concerns expressed.

**Text as initially recommended for change:** *Since the change pertains to a reference citation and the addition of a new paragraph, only the proposed language is shown.*

**Text as now recommended for change:**

9 VAC 10-20-130.5.b.(1)-(5)

(1) Agricultural activities may encroach into the landward 50 feet of the 100-foot wide buffer area when at least one agricultural best management practice which, in the opinion of the local soil and water conservation district board, addresses the more predominant water quality issue on the adjacent land – erosion control or nutrient management – is being implemented on the adjacent land, provided that the combination of the undisturbed buffer area and the best management practice achieves water quality protection, pollutant removal, and water resource conservation at least the equivalent of the 100-foot wide buffer area. ~~*(a)*~~ *If nutrient management is identified as the predominant water quality issue, a nutrient management plan, including soil tests, must be developed consistent with the ~~November 1995 edition of the "Virginia Nutrient Management Standards and Criteria,"~~ Virginia Nutrient Management and Training Certification Regulations (4 VAC 5-15-10 et sea. of the Virginia Administrative Code) administered by the Virginia Department of Conservation and Recreation.*

~~*(b) In addition, if specific problems are identified which, in the opinion of the local soil and water conservation district board, are causing pollution of the nearby tributary stream or violate performance standards pertaining to the vegetated buffer area, such problems must be corrected within a specified period of time, consistent with time frames and conditions in the implementation guidelines of the Virginia Agricultural Stewardship Act (§§ 10.1-559.1 through 10.1-559.11 of the Code of Virginia). Such problems requiring correction shall be reported to the local government for the purposes of follow-up and, if necessary.*~~

*(2) Agricultural activities may encroach within the landward 75 feet of the 100-foot wide buffer area when agricultural best management practices which address erosion control, nutrient management, and pest chemical control, are being implemented on the adjacent land. The erosion control practices must prevent erosion from exceeding the soil loss tolerance level, referred to as "T," as defined in the "National Soil Survey Handbook" of November 1996 in the "Field Office Technical Guide" of the U.S. Department of Agriculture Natural Resource Conservation Service. A nutrient management plan, including soil tests, must be developed, consistent with the* ~~November 1995 edition of the "Virginia Nutrient Management Standards and Criteria,"~~ *Virginia Nutrient Management and Training Certification Regulations (4 VAC 5-15-10 et sea. of the Virginia Administrative Code) administered by the Virginia Department of Conservation and Recreation.* ~~*In addition, if specific problems are identified which, in the opinion of the local soil and water conservation district board, are causing pollution of the nearby tributary stream or violate performance standards pertaining to the vegetated buffer area, such problems must be corrected within a specified period of time,* consistent with time frames and conditions in the implementation guidelines of the Virginia Agricultural Stewardship Act (§§ 10.1-559.1 through 10.1-559.11 of the Code of Virginia). Such problems requiring correction shall be reported to the local government for the purposes of follow-up and, if necessary, enforcement.~~ *In conjunction with the remaining buffer area, this collection of best management practices shall be presumed to achieve water quality protection at least the equivalent of that provided by the 100-foot wide buffer area.*

*(3) The buffer area is not required to be designated adjacent to agricultural drainage ditches if at least one best management practice which, in the opinion of the local Soil and Water Conservation District board, addresses the more predominant water quality issue on the adjacent land – either erosion control or nutrient management – is being implemented on the adjacent land.*

*(4) If specific problems are identified pertaining to agricultural activities which, in the opinion of the local soil and water conservation district board, are causing pollution of the nearby tributary stream or violate performance standards pertaining to the vegetated buffer area, such problems must be corrected within a specified period of time that takes into account the seasons and other temporal considerations so that the probability for successfully implementing the corrective measures is greatest.*

*(5) In cases where the landowner or his agent or operator has refused assistance from the local soil and water conservation district in complying with or documenting compliance with the agricultural requirements of this chapter, the District shall report the noncompliance to the local government. The local government shall require the landowner to correct the problems within a specified period of time not to exceed 18 months from their initial notification of the deficiencies to the landowner. The local government, in cooperation with the District, shall recommend a compliance schedule to the landowner. This schedule shall expedite environmental protection while taking into account the seasons and other temporal considerations so that the probability for successfully implementing the corrective measures is greatest.*

**9 VAC 10-20-130.6**

*WQIA*

**Comments:** Some commenters noted that to be consistent with the intent of Intensely Developed Area provisions in the regulations, Water Quality Impact Assessments should not be required for projects within designated IDAs. Another commenter, unimpressed with the quality of the Water Quality Impact Assessments he has been exposed to, encouraged

a more aggressive approach to these assessments, wherein all relevant water quality variables should be addressed and developers should have to collect data and demonstrate their alternative measures perform as proposed. CBF recommends adding a provision clearly requiring public notice and a public review of Water Quality Impact Assessments, as well as for any impact to the RPA, and incorporating minimum standards for WQIA content.

**Agency Response:** While the IDA provisions allow development within the RPA, it is still important to conduct a more careful evaluation of the potential impacts that close to the water and the appropriate mitigation measures. CBLAD has provided guidance regarding the appropriate content of WQIAs and considers this sufficient. Changes to 9 VAC 10-20-150.C, pertaining to the Exceptions Process, will require public notice and review of any RPA/buffer-related exception requests. In view of these facts, CBLAD staff recommends no further changes in response to these comments.

**Comments:** A number of localities stated that the requirement to notify the Board of all development requiring a Water Quality Impact Assessment should be deleted. They consider this language, also found in 9 VAC 10-20-250, to add another layer of unnecessary reporting and, in reality, the latter requirement has never been enforced by CBLAD. One locality stated it is not clear whether localities will maintain the authority to grant waivers based on WQIAs or the CBLAB will take over that authority. If CBLAD intends to make these decisions, will the Board make decisions in a timely manner? Would the Board take action against a locality that granted a waiver with which it disagreed?

**Agency Response:** The provision of concern, pertaining to localities notifying the Board of all development requiring WQIAs, is intended to encourage localities to maintain information about, or at least, a listing of, such projects. This will be useful when the Board receives citizen complaints or conducts implementation reviews if local programs. This provision does not mean that localities have to either notify CBLAD each time a WQIA is reviewed or submit the WQIA to CBLAD for review and comment. It certainly does not mean that the Board will take over the review and approval of locally submitted WQIAs. In this light, staff recommends no further changes in response to these comments.

**Comments:** A number of localities commented that the 90-day CBLAD comment period is not acceptable, since localities have only 45 days to act on a development proposal. Suggest a 30-day turn-around time as more practical to meet local deadlines. This time would allow local governments to utilize the CBLAD comments in their decision process and would be consistent with other state agency review periods. One commenter requested that the word “will” in the last sentence be replaced with “may” or “shall.”

**Agency Response:** The existing 90-day time limit is established in Section 10.1-2112 of the Bay Act. While CBLAD is allowed 90 days, staff routinely completes reviews and provides comments within 14 days and rarely takes more than a month. Staff is continually sensitive to local deadlines for receiving comments and taking action on site plans. Therefore, staff recommends no further changes in response to this comment.

## 9 VAC 10-20-130.7

*Buffer*

**Comments:** A few localities requested that the language that in IDAs buffers "may not be required" be changed to "is not required" (alternative permissive language). Also, industrial waterfronts should be exempted altogether from buffers, since it is impractical to try to establish them in such locations. They contend that buffer areas in IDAs do not make sense, do not provide the pollutant removal functions of other buffers and should not be required at all. A few localities expressed a concern that the amendments would ultimately require localities to ensure that buffers are established in

IDAs (contrary the flexibility offered in the past). They pointed out that requiring localities to ensure revegetation of vacant parcels within the IDA could be problematic. They asked that the Board clarify what ". . . shall give consideration . . ." means and the implications if the locality disagrees with CBLAD's position in a given situation. On the other hand, a few commenters requested the Board to change the phrase "shall give consideration to implementing measures that would establish vegetation . . ." to read "shall design a plan and implement measures to establish vegetation." A few commenters pointed out that, given the intent to have buffers established over time and that infill is not an allowed RPA use (9 VAC 10-20-130.1), allowing encroachments for infill would seem to create an internal inconsistency with the regulations.

**Agency Response:** Buffers, as the landward component of the RPA, are required to be designated as such in highly urban areas. However, it is important to separate the difference between designation of the buffer area as the landward component of the RPA, and the requirements in the Regulations as they pertain to permitted activities and vegetation requirements. The Department concurs that in highly urban areas, vegetated buffers may not make economic or water quality sense, as oftentimes, the stormwater is piped through the buffer area or treated as a whole through other means. The current and proposed Regulations permit the designation of Intensely Developed Areas (IDAs) for areas of localities where little of the natural environment remains. IDAs are required to be reviewed and approved by the Local Assistance Board, but within IDAs, the imposition of a vegetated buffer area may not be required. The regulations encourage protection and reestablishment of buffers in IDAs, but local officials have discretion over such decisions. IDAs are overlays to the RPA/RMA designation, and the only performance criteria that are required in these areas relates to the redevelopment criteria. As the existing and proposed Regulations already include flexibility for urban areas with respect to the vegetated buffer requirements, the Department is of the opinion that no changes need to be made in response to these comments.

## 9 VAC 10-20-140

**Comment:** A few commenters asked that the Board not repeal this language because localities should be required to incorporate these criteria into their comprehensive plans and ordinances.

**Agency Response:** These commenters did not understand that this requirement is still in the regulations in another location.

## 9 VAC 10-20-150

*Exemptions*

**Comment:** CBF appears to have misunderstood this section to remove the exemption for passive recreation, etc. In fact, these exemptions were merely relocated to 9 VAC 10-20-130.2.

**Agency Response:** No further action is necessary.

**Comment:** One commenter stated that wetland mitigation projects and wetland mitigation banking activities should be declared exempt, without the need for a WQIA, provided they are constructed in accordance with Corps of Engineers/DEQ permits and/or an approved Wetland Mitigation Banking Instrument.

**Agency Response:** CBLAD staff disagree, especially in light of the fluctuating federal and state requirements and oversight pertaining to such activities.

**9 VAC 10-20-150.A.1**

*Exemptions*

**Comment**Structures that have exceptions for location within the RPA (with BMP use) should be allowed to have reasonable additions permitted.

**Agency Response:** This language allows the local to consider such requests through an administrative process.

**9 VAC 10-20-150.A.2**

*Exemptions*

**Comment**: During the discussion of these public comments, a Board member felt that this language needed further clarification as to effect.

**Agency Response:** Staff **c**oncurs.

**Text as initially recommended for change**:

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9 VAC 10-20-150.A.2 It is not the intent of this chapter to prevent the reconstruction of pre-existing structures within Chesapeake Bay Preservation Areas from occurring as a result of casualty loss unless otherwise restricted by local government ordinances.

**Text as now recommended for change**:

9 VAC 10-20-150.A.2 ~~It is not the intent of this chapter~~ *This chapter shall not be construed* to prevent the reconstruction of pre-existing structures within Chesapeake Bay Preservation Areas from occurring as a result of casualty loss unless otherwise restricted by local government ordinances.

**9 VAC 10-20-150.B.2**

*Exemptions*

**Comment**: During the discussion of these public comments, a Board member noted the need to add the word "public" to the short title of subsection B so that it is consistent with the text that follows.

**Agency Response:** Staff **c**oncurs.

**Text as initially recommended for change**:

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9 VAC 10-20-150.B Public utilities, railroads, *roads,* and facilities exemptions.

**Text as now recommended for change**:

9 VAC 10-20-150.B Public utilities, railroads, *public roads,* and facilities exemptions.

**Comments:** One local government noted that it is not clear what is meant by "local" lines. If the intent is to distinguish between the utilities covered in paragraphs 1 and 2 and would not preclude utility construction within RPAs, then the County does not object. Others noted that exempting only "local" utilities could impact some City projects involving regional utilities, such as HRSD. Increased CBLAB oversight of local zoning and subdivision ordinances could conflict with existing local standards for utilities.

**Agency Response:** The purpose of the word “local” is indeed to distinguish between large transmission lines regulated by the State Corporation Commission and locally owned and maintained utility service lines. CBLAD would not expect significant impacts to City projects assuming the conditions in the regulations are being met. These conditions have been in place since the regulations were originally adopted. Staff recommends no further changes in response to these comments.

## 9 VAC 10-20-150.C

*Exceptions*

**Comment:** Currently appeals of local decisions about exceptions are directed to the County governing body. Does the CBLAB intend to take over that authority to review appeals or overrule the local government body's decisions?

**Agency Response:** The Board certainly does not intend to insert itself into the local Exceptions process. The Board has no authority to directly overrule a local government’s decision regarding an Exception request. There are clear appeals procedures established in local ordinances and regulations, usually proceeding through some higher level(s) of local government review and, ultimately, to the Circuit Court. However, the Board does intend to evaluate examples of granted Exceptions when conducting local program implementation reviews, to determine if localities are, indeed, reviewing Exception requests in a manner consistent with the criteria in the regulations.

**Comments:** A number of localities expressed a concern that this language is not consistent with the mechanisms through which some localities currently implement exceptions, as allowed by the CBLAB, and would be less flexible. They are concerned that the revision appears to force the locality to implement the process through the zoning ordinance only and have the BZA issue special exceptions, which they strongly oppose. These are not considered appropriate for CBPA exceptions, which are not related to water quality protection, and it is currently outside the BZA's authority to grant exceptions for ordinance requirements other than zoning.. The referenced Code language (15.2-2309) makes no reference to water quality protection. They believe using the BZA process is too burdensome, would add too much time and cost to the process, and would not provide enough flexibility to accommodate individual local circumstances and preferences. They recommend removing the references to the State Code pertaining to BZAs and generally support the exception/variance policy currently in place or, perhaps, replace this language with that found in the CBLAD program model ordinance. If the intent is to set up a local process similar to 15.2-2309 or a separate Board to grant exceptions, then the Board should make this clear and provide additional guidance about setting up such a Board. Also, the criteria in don't relate to water quality issues.

Some localities predict that requiring the BZA process to be used to consider exceptions will force the establishment of residential IDAs in some localities, since the bulk of exceptions are for accessory structures on shallow waterfront lots created prior to October 1, 1989. On the other hand, some commenters stated that requiring BZA review of exceptions may be one way to provide more public awareness and involvement in the process, and may discourage so many applications for exceptions. However, others feel that the existing appeals process better balances water quality and other public values, in addition to economic hardship and that using the BZA for the exceptions process may actually result in too many exceptions being granted. In particular, a number of citizen commenters also strongly oppose giving local BZAs any more authority, much less mandating that they have authority over exceptions in the Bay Act program. They cite too many BZA horror stories. They believe the authority to review and grant Exceptions should be maintained by the local government, not a court-appointed board.

A few commenters recommended that the Board require localities to publicize strict, ecologically based, legally binding criteria for granting exceptions to the buffer requirement, and one commenter stated that if exception provisions are left as proposed, a written waiver should be required with a distinct timeline associated with it, so that action would have to be taken within that time period and the exception/waiver would not extend indefinitely into the future.

Some commenters recommend that the regulations should included site-specific performance criteria to provide clear guidance and should allow few or no exceptions, in order to establish consistent treatment of shoreline development, preventing abuse of local discretion, and preventing development that is too intensive for the site. For example, some commenters stated that the Board should minimize allowances for exceptions and waivers and require the planting of native trees and woody vegetation to mitigate the negative impact of development where exceptions or waivers are granted.

**Agency Response:** The intent of the initially proposed change was to establish a procedure through which findings needed to be made and for which there would be public notice. While the intent of the initial change was to reference the procedure used by a BZA, the language inappropriately placed the exception under the auspices of a BZA. Because this was not the intent, the Department recommends that the proposed language be deleted in its entirety and replaced with new language that is responsive to many of the comments that were raised. The proposed text still accomplishes the initial intent of establishing review criteria, requiring the making of findings, and adding a public notice component in the exception process. Also, clarification is provided to the effect that additions to non-conforming structures may be processed as an administrative waiver as opposed to an exception. This latter item is responsive to other comments raised during the public comment process.

**Text as initially recommended for change**:

(NOTE: Exceptions were originally in Section 10-20-160 and then changed to be Subsection C of 10-20-150. As such the initially proposed changes totally deleted 10-20-160 and the new text under 10-20-150.C did not show specific changes i.e. the entire section was underlined. The text below shows the specific changes proposed to the existing text.)

9VAC 10-20-150. ~~Administrative waivers and exemptions.~~ *Nonconformities, exemptions, and exceptions*.

C. Exceptions to the requirements of ~~these regulations~~ *Part IV (9VAC 10-20-110 et seq.) of this chapter* may be granted, proved that: (i) exceptions to the criteria shall be the minimum necessary to afford relief, ~~and~~ (ii) reasonable and appropriate conditions upon any exception shall be imposed as necessary so that the purpose and intent of the Act is preserved, *and (iii) the provisions of §15.2-22309 of the Code of Virginia are met*. *Each* local ~~governments~~ *government* shall design an appropriate process or processes for the administration of exceptions, in accordance with ~~Part V (9VAC 10-20-170 through 9VAC 10-20-230)~~ *§15.2-22309 of the Code of Virginia and subsection 6 of VAC 10-20-130*.

**Text as now recommended for change:**

(Delete the previously recommended language and replace with the following☺

C. Exceptions

1. *Exceptions to the requirements of 9 VAC 10-20-120.10 and 9 VAC 10-20-130 of this chapter may be granted, provided that a finding is made that:*

    a. *The requested exception to the criteria is the minimum necessary to afford relief; and,*
    b. *Granting the exception will not confer upon the applicant any special privileges that are denied by Part IV (9 VAC 10-20-110 et seq.) of this chapter to other property owners~~.~~ who are subject to its provisions and who are similarly situated; and,*
    c. *The exception is in harmony with the purpose and intent of Part IV (9 VAC 10-20-110 et seq.) of this chapter and is not of substantial detriment to water quality; and,*
    d. *The exception request is not based upon conditions or circumstances that are self-created or self-imposed; and*
    e. *Reasonable and appropriate conditions are imposed, as warranted, that will prevent the allowed activity from causing a degradation of water quality; and,*
    f. *Other findings as appropriate and required by a locality are met.*

2. *Exceptions to other provisions of Part IV (9VAC 10-20-110 et seq) may be granted provided that:*

    a. *Exceptions to the criteria shall be the minimum necessary to afford relief; and*
    b. *Reasonable and appropriate conditions upon any exception granted shall be imposed as necessary so that the purpose and intent of the Act is preserved.*

3. *Each local government shall design an appropriate process or processes for the administration of exceptions. The process shall include, but not be limited to, the following provisions:*

a. *An exception may be considered and acted upon only by the local legislative body; or the planning commission; or a special committee, board, or commission established or designated by the locality to implement the Chesapeake Bay Preservation Act and its Regulations.*

b. *If the implementation of the provisions of Chesapeake Bay Preservation Act and its Regulations is accommodated through the local zoning code, exceptions may only be granted pursuant to the provisions of § 15.2-2286(4) or § 15.2-2309 of the Code of Virginia unless there are specific provisions within the zoning code's plan of development review process that allow for consideration of exceptions as a part of that process.*

c. *The provision of Paragraph C(2)(b) above notwithstanding, no exception shall be authorized except after notice and hearing as required by § 15.2-2204 of the Code of Virginia except than only one hearing shall be required; however, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the notice may be given by first-class mail rather than by registered or certified mail.*

d. *Notwithstanding the previous items, a through c, additions and modifications to existing, legal principal structures may be processed through an administrative review process as allowed by subsection A of this section, subject to the findings required by subsection C 1 of this section but without a requirement for a public hearing. This provision does not apply to accessory structures.*

## 9 VAC 10-20-171, 191, and 201

### *Local Program Implementation Provisions*

**Comment:** Several local governments commented that implementation reviews should consider the specific land use, planning, and zoning context of each jurisdiction. The water quality needs of each locality should be identified and jurisdictions should only be required to do what is needed to address local program shortcomings.

**Agency Response:** While this level of detail is not addressed in the regulations, the concern is noted. The Board has always recognized that there are unique differences among localities and local land use that necessitate the kinds of flexibility incorporated into these regulations. Department staff expects to continue to be sensitive to such issues as they begin to conduct local program implementation reviews. Staff recommends no further changes in response to this comment.

## 9 VAC 10-20-171

### *Comprehensive Plan*

(NOTE: In response to the many comments on this section of the regulations, CBLAD staff is recommending extensive reorganization and revisions. Therefore, the comparative text is shown as a whole at the end of the comments pertaining to Section 171.)

**Comment:** One local government provided comments supporting addition of the words "as applicable to the locality" in

the two places proposed.

**Agency Response:** Acknowledged. This support will be communicated to the Board.

**Comment:** Some localities commented that the local comprehensive plan is not well suited in structure to address the particular items identified in this section of the regulations. The suggest that the Board should provide for alternative approaches to achieving the water quality purposes of the comprehensive plan requirements where this is the case.

**Agency Response:** Agency staff conducted further discussions with local government representatives at two PDC-sponsored meetings following the public comment process, to hear more about these concerns. As a result, further revisions are being recommended. See the text changes at the end of the comments pertaining to Section 171.

**Comment:** Several localities expressed concern about the numerous times the word "should" is proposed to be changed to "shall." In particular, they requested that “shall” be changed to “may” in the first paragraph. They noted that comprehensive Plans are supposed to be general, not explicit. They questioned whether it can be demonstrated that achievement of Bay Act goals has suffered due to a lack of the information specified to be required in local comprehensive plans. On the other hand, CBF comments strongly supported proposed changes of the word "should" to "shall" through Section 171.

**Agency Response:** Replacing “should” with “shall” in this section of the draft revision is not intended to be a substantive change, but rather a reflection of the intent of the Act and Regulations and Department policy with regard to the content of comprehensive plans. The Department has already reviewed a majority of local plans under these criteria and has been very responsive to local desires regarding plan format. It is very important, however, that a complete planning process be undertaken for each policy area in the Regulations and that the steps of this process at least be summarized or referenced in the official Plan. Department staff believes the proposed changes to this section help clarify the comprehensive plan requirements of the Regulations and that these changes should be adopted by the Board.

**Comment:** One commenter noted that, given new State Law and Chesapeake Bay Program commitments toward developing watershed plans, it will be important to assure that regional demands for resources such as water be incorporated into local comprehensive plans to help provide equity in projected uses.

**Agency Response:** While somewhat related, water supply planning does not influence water quality protection as much as the reverse is true. Staff recommend no further changes in response to this comment.

**9 VAC 10-20-171.1**

*Comprehensive Plan*

**Comment:** Several localities requested that the word “shall” be changed to “may.”

**Agency Response:** Staff considers the change of “should” to “shall” is appropriate and recommends that they be left as proposed.

**9 VAC 10-20-171.1.f**

*Comprehensive Plan*

**Comment:** One County recommended amending this to state: "An identification, to the extent practicable, of existing sources of pollution (if known)."

**Agency Response:** CBLAD staff recommend leaving the language as proposed.

**9 VAC 10-20-171.2**

*Comprehensive Plan*

**Comment:** A number of local governments commented that the regulations should clearly state that the required analysis and documentation should be part of the local comprehensive planning process, but not necessarily included in the text of the plan document itself.

**Agency Response:** Acknowledged. A change is recommended to reflect this concept. See the proposed text changes at the end of the comments pertaining to Section 171.

**9 VAC 10-20-171.2.b**

*Comprehensive Plan*

**Comment:** Several localities requested that the word "shall" be changed to "may."

**Agency Response:** Staff considers the change of "should" to "shall" is appropriate and recommends that they be left as proposed.

**9 VAC 10-20-171.2.b.(2)**

*Comprehensive Plan*

**Comment:** One County recommended amending this to say: "Protection of potable water supply, including groundwater resources and threats, if any, to the water supply or groundwater resources from existing pollution sources."

**Agency Response:** Staff is recommending a slight change in this language, to account for potential pollution sources as well. The thrust of this requirement is that the locality conduct an evaluation, which would identify any threats. Therefore, CBLAD staff considers including the words "if any," as proposed, to be unnecessary.

**Text of Section 171 as now recommended for change:**

PART V

~~IMPLEMENTATION, ASSITANCE, AND DETERMINATION OF CONSISTENCY~~

*COMPREHENSIVE PLAN CRITERIA*

9 VAC 10-20-170 Purpose

The purpose of this part is to assist local governments in the ~~timely preparation of local programs to implement the Act, and to establish guidelines for determining local program consistency~~ *development of a comprehensive plan or plan component that is consistent* with the Act, and to establish guidelines for determining ~~local program~~ *the* consistency *of the local comprehensive plan or plan component* with the Act.

Sections 10-20-180 through10-20-220 are being repealed.

*9 VAC 10-20-171.* Comprehensive Plans

Local governments shall review and revise their comprehensive plans, as necessary, for compliance with § 10.1-2109 of the Act *and this chapter*. As a minimum, the comprehensive plan or plan component ~~should~~ *shall* consist of the following basic elements: (i) a summary of data collection ~~and analysis~~; (ii) ~~a~~ *analysis and* policy ~~discussion~~ *discussion(s)*; (iii) ~~a~~ land use plan ~~map~~ *map(s)*; *and* (iv) implementing measures, including specific objectives and a time frame for accomplishment.

1. Local governments ~~should~~ *shall* establish *and maintain, as appropriate,* an information base from which ~~to make~~ policy choices *are made* about future land use and development that wi ll protect the quality of state waters. This element of the plan should be based upon the following*, as applicable to the locality*:

   a. ~~Information used to designate~~ *The location and extent of* Chesapeake Bay Preservation Areas;

   b. ~~Other marine resources~~ *Physical constraints to development, including soil limitations*;

   *c. The character and location of commercial and recreational fisheries and other aquatic resources;*

   d. ~~*c.*~~ Shoreline *and streambank* erosion problems ~~and location of erosion control structures~~;

   e. ~~*d.* Conflicts between existing~~ Existing and proposed land uses ~~and water quality protection~~;

   f. ~~*e.*~~ *Catalog of existing and potential water pollution sources*;

   g. ~~*f.*~~ *Public and private waterfront access areas, including the general location or information on docks, piers, marinas, boat ramps, and similar water access facilities;*

   h. ~~*e/g.*~~ A map or map series accurately representing the above information.

2. As part of the comprehensive plan, local governments ~~should~~ *shall* clearly indicate policy on land use issues relative to water quality protection *based on an analysis of the data referred to in subdivision 1 of this section*. Local governments ~~should~~ *shall* ensure consistency among the policies developed.

   a. Local governments ~~should~~ *shall* discuss each component of the Chesapeake Bay Preservation Areas in relation to the types of land uses considered appropriate and consistent with the goals and objectives of the Act, this chapter, and their local programs.

   b. As a minimum, local governments ~~should~~ *shall* prepare policy statements for inclusion in the plan on the following issues*, as applicable to the locality*:

(1) Physical constraints to development, including *a discussion of the relationship between* soil limitations *and existing and proposed land use*, with an explicit discussion of soil suitability for septic tank use;

(2) Protection of potable water supply, including groundwater resources *and threats to the water supply or groundwater resources from existing* and potential *pollution sources*;

~~(3) Relationship of land use to commercial and recreational fisheries;~~ *(3) Relationship of land use to commercial and recreational fisheries and other aquatic resources;*

~~(4) Appropriate density for docks and piers;~~ *(4) Siting of docks and piers;*

(5) ~~*(3)*~~ Public and private access to waterfront areas and effect on water quality;

~~(6) Existing pollution sources;~~ *(6) Mitigation of the impacts of land use and associated pollution upon water quality;*

~~*(4)*~~ (7) Shoreline and streambank erosion problems; and

~~(7)~~ ~~*(5)*~~ *(8)* Potential water quality improvement ~~and~~ *through reduction of existing pollution sources* ~~through~~ *and* the redevelopment of Intensely Developed Area *and other areas targeted for redevelopment*.

c. For each of the policy issues listed above, the plan ~~should~~ *shall* contain a discussion of the scope and importance of the issue, ~~alternative policies considered,~~ the policy adopted by the local government for that issue, and a description of how the local policy will be implemented.

d. Within the policy discussion, local governments ~~should~~ *shall* address ~~consistency~~ *the relationship* between the plan, ~~and all adopted~~ *existing and proposed* land use, public services, ~~land use value taxation ordinances and policies,~~ and capital improvement plans and budgets *to ensure a consistent local policy*.

**9 VAC 10-20-181**

*Local Program Implementation Provisions*

(NOTE: In response to the many comments on this section of the regulations, CBLAD staff is recommending extensive reorganization and revisions. Therefore, the proposed text is shown as a whole at the end of the comments pertaining Part VI, consisting of Sections 181-191. Staff is recommending that Section be deleted, since it will no longer be needed.)

**Comment:** Numerous local governments expressed concern about their perception that the Board is phasing out local stand-alone ordinances in favor of integrating the regulations into existing subdivision and zoning ordinances. They commented that the regulations should continue to allow localities flexibility to establish their local programs in the most effective fashion for their individual jurisdictions, whether under their zoning code, blended into various existing ordinances, or as a stand-alone ordinance. However, CBF is generally supportive of the amendments proposed for this

section. One County suggested changing the language to say: "The purpose of this part is to assist local governments in the development of zoning and subdivision or other ordinances that are consistent with the Act, . . ." This change would allow localities to establish stand-alone ordinances.

**Agency Response:** It is not the Board's intent to prevent localities from continuing to have stand-alone Bay Act ordinances. To clarify this, staff has recommended changes noted above, pertaining to subsection 110.D, and a more generic change is recommended to address this issue in this section. See the proposed text changes at the end of the comments pertaining to Part VI, below.

## 9 VAC 10-20-191 & 201

*Local Program Implementation Provisions*

**Comment:** CBF is generally supportive of the amendments proposed for this section.

**Agency Response:** Acknowledged. This support will be communicated to the Board.

**Comments:** Several local governments provided their opinion that localities already effectively enforcing the regulations should not have to further amend their zoning and subdivision ordinances, with which local citizens are familiar and comfortable, or their Bay Act ordinances. They stated concerns that some of the proposed amendments seem to describe and require uses of subdivision and zoning ordinances that were never anticipated (in State Code). One locality commented that the proposed required modifications to local zoning and subdivision ordinances are impractical within its jurisdiction, where over 90 percent of the City is developed. They believe that the Board should recognize the current reference statements in their local ordinance(s), since the Board has approved them.

**Agency Response:** Further changes are being proposed that focus on key issues and provide broad flexibility otherwise. See the proposed text changes at the end of the comments pertaining to Part VI, below.

### 9 VAC 10-20-191.A

*Zoning Ordinance*

**Comment:** Several localities commented that the scope of the requirement that "uses permitted by the local zoning ordinance are consistent with the comprehensive plan" should be narrowed to water quality protection issues and should not affect other land use decisions. For example, this requirement should not place a locality in the position of requiring, by ordinance, compliance with policies that the locality intends to implement during rezoning, etc. on a case-by-case basis. They believe that CBLAD should focus on water quality protection, not regulating land use nor getting involved with local land use ordinances. Alternative suggestions were that the Board replace the word "shall" with the word "may" in the second sentence and/or that they replace the troublesome language with a more general requirement of "performance standards."

**Agency Response:** The way land use is managed can have profound effects on water quality. Further changes are being proposed that focus on key issues and provide broad flexibility otherwise. See the proposed text changes at the end of the comments pertaining to Part VI, below.

**Comments:** Many local governments commented that the new requirement to include a "development suitability hierarchy" is confusing and inappropriate for a zoning ordinance, since the zoning ordinance is a regulatory tool, not a

policy document like the comprehensive plan. They requested that the Board at least clarify what is meant by "development suitability hierarchy of land uses and performance standards within local zoning ordinances." They also expressed concern about who would determine what is "suitable" (by whose standards).

**Agency Response:** References to the "development suitability hierarchy" are being deleted in the proposed text changes at the end of the comments pertaining to Part VI, below.

**9 VAC 10-20-191.A.2**

*Zoning Ordinance*

**Comments:** Some localities commented that if the intent of this language is to suggest/require that localities establish zoning-based requirements/thresholds for impervious cover, land disturbance and vegetation preservation, this should be stated more clearly. If there is a different intent, then it is should be clarified. Some local governments commented that requiring "specific development standards" to be included without providing specific criteria in the regulations invites inconsistent implementation from one locality to another. They believe that if specific standards are to be required, this section should be revised to require adoption of specific standards once CBLAD, with input from affected stakeholders, has developed appropriate measures to accomplish the general performance criteria. One locality commented that it was not opposed to the regulations requiring the establishment of thresholds for implementing the three general criteria, provided that CBLAD provides guidance for establishment and implementation of such standards for various land uses/zoning districts. However, since extent of any proposed use is site specific, it may be more appropriate to address the three general criteria through site-specific analyses pursuant to land use and development performance criteria triggered when a development proposal is submitted. However, another locality opposes mandating such standards through local zoning requirements.

**Agency Response:** Further changes are being proposed that focus on key issues and provide broad flexibility otherwise. See the proposed text changes at the end of the comments pertaining to Part VI, below.

**Comments:** A few localities commented that requiring the minimization of impervious surfaces contradicts the concept in 9 VAC 10-20-191,A.1.b of encouraging compact efficient development, where they expect imperviousness to be generally higher as a percentage of the total site. They requested the Board to clarify the intent of this language, so as not to promote sprawl. However, others supported this provision, recognizing that properly planned Cluster Development does not promote sprawl and typically reduces impervious area and provides more open space, as a percentage of the total site. Usually increased impervious areas are more associated with sprawl due to increased road length and the destruction of vegetation to install utility lines, etc.

**Agency Response:** The intent of this provision is not to promote one type of development over another, but rather to recognize that in any type of development design decisions can be made that result in minimum imperviousness. Examples include multi-story construction, reduced parking bay dimensions, reduced formulas regarding required parking for commercial developments, etc. Further changes are being proposed that focus on key issues and provide broad flexibility otherwise. See the proposed text changes at the end of the comments pertaining to Part VI, below.

**9 VAC 10-20-191.A.3**

*Zoning Ordinance*

**Comment:** Some localities commented that requiring consistency between the zoning ordinance and the comprehensive plan goes above and beyond state land use statutes (in Title 15.2), which do not require such consistency, even though it is desirable and should be encouraged.

**Agency Response:** Acknowledged. Department staff concurs that it is inappropriate to state in these regulations the direct reference to consistency of a local zoning ordinance with the locality's comprehensive plan due to the over-reaching aspects of such a requirement. The Department does note that under the Section 10.1-2109 of the Bay Act localities must incorporate protection of the quality of state waters in to their comprehensive plans, zoning ordinances and subdivision ordinances; thus, there should be an inherent consistency with respect to issue of protection of the quality of state waters.

**9 VAC 10-20-201**

*Subdivision Ordinance*

**Comments:** Some local governments commented that the proposed amendments in this section are generally inappropriate and should not be adopted. It was their view that the majority of the proposed changes relate to requirements generally found in other ordinances and code provisions. One person commented that the word "shall" in the introductory paragraph appears to be in conflict with the word "may" in paragraph 1(b). Another person recommended that the Board should replace the word "shall" with the word "may" in the first paragraph.

**Agency Response:** Department staff disagrees with the commenter regarding the perceived conflict between "shall" and "may." Local governments are required (shall) to incorporate the basic provisions of the regulations, but they "may" incorporate other useful tools as well. Further changes are being proposed that focus on key issues and provide broad flexibility otherwise. See the proposed text changes at the end of the comments pertaining to Part VI, below.

**9 VAC 10-20-201.1**

*Subdivision Ordinance*

**Comments:** Numerous local governments commented that they object to the proposed requirement to place building limits on plats. They consider this requirement to be excessive, inappropriate, impractical and unnecessary. They do not consider such notations to be consistent with the purpose of the plat, as a titling instrument. They also expressed concern that there would be too great a liability for the locality if errors are recorded. They also are concerned that if local set-back requirements were to change, that might necessitate a redelineation and a resubmission of the plat, resulting in a burden for the lot owner. They note that the information is available from other sources and is routinely considered when reviewing development proposals. One person recommended requiring in the regulations that a licensed surveyor would have to show the landward limit of tidal wetlands on the plat map of each waterfront lot, which would be a legally enforceable line from which to measure the buffer.

**Agency Response:** A number of localities are already including the listed notations on plats. The concern may arise

from confusion over whether the note is general in nature or whether it reflects a "meets and bounds" survey. The more general notes provide ample flexibility, whereas the "meets and bounds" references can result in problems with respect to changes over time, such as migrating shoreline location, etc. Further changes are being proposed that focus on key issues and provide broad flexibility otherwise. See the proposed text changes at the end of the comments pertaining to Part VI, below.

**Comment:** A number of localities commented that they perceive some of the proposed changes to be duplicative between the zoning ordinance and the subdivision ordinance, or that certain requirements are referenced to the wrong ordinance. For example, they note that lot sizes, coverage and layout are addressed in zoning ordinances, not subdivision ordinances. Also, although optional, the use of common septic systems and artificial wetlands for sewage treatment is not considered appropriate for inclusion in subdivision ordinances. They do not consider the local subdivision ordinance to be the appropriate mechanism for setting specific development standards that purportedly relate to water quality. Some stated that some of these amendments are unworkable because appropriate development standards cannot be crafted for the three general performance criteria, other than (perhaps) clustering. One suggested eliminating this subsection or combining these provisions with 9 VAC 10-20-191.B. A few localities questioned who would determine what street design standards are appropriate – the locality or CBLAD? They noted that VDOT specifies most, if not all, of the criteria for roadway and subdivision street design and, to a large extent, layout. One noted that this is especially true in rural areas.

**Agency Response:** It is the charge of the Board to address the implications associated with the development of land upon water quality; it is very appropriate that the regulations specifically address land use and development ordinances. Notwithstanding this charge, the items raised with regard to this subject have merit and changes were appropriate. Thus, CBLAD staff recommends that references to lot sizes, street dimensions and such be removed from the regulations. Also, it is evident that program implementation would be best served by a restructuring of Part VI. Further changes are being proposed that focus on key issues and provide broad flexibility otherwise. See the proposed text changes at the end of the comments pertaining to Part VI, below.

**Comment:** The IDA provisions for buffer areas and performance standards need to be reflected here. Flexibility in these requirements is needed to reflect the use of Family Subdivision provisions in most localities. However, family transfers involve the creation of a lot and, as such, should ideally conform to the same environmental standards as all lots. Family transfers, by their nature, allow flexibility and could be used to circumvent minor subdivision rules.

**Agency Response:** Further changes are being proposed that focus on key issues and provide broad flexibility otherwise. See the proposed text changes at the end of the comments pertaining to Part VI, below.

## 9 VAC 10-20-201.2

*Subdivision Ordinance*

**Comment:** One locality stated they are unaware of any specific type of development that would be considered incompatible with RMA land categories. Therefore, it is not clear how this provision would be implemented. More

clarification is needed.

**Agency Response:** Acknowledged. Further changes are being proposed that focus on key issues and provide broad flexibility otherwise. See the proposed text changes at the end of the comments pertaining to Part VI, below.

## 9 VAC 10-20-201.3

*Subdivision Ordinance*

**Comments:** A few commenters supported the incorporation of the specified performance criteria on subdivision plat maps. However, numerous localities again pointed out that designation of setbacks and buildable areas on plats is not consistent with their purpose as a "title" instrument. One locality commented that the added plat requirements are extremely burdensome and that plats are not an appropriate mechanism for recording what, in that locality, is effectively a zoning overlay district spanning the entire jurisdiction. Others noted that setbacks do not represent a permanent restriction on property and can be unilaterally modified through the legislative process or variances; therefore, showing them on plats can be misleading. A few commented that the extent of a specific "proposed" use will not be known at the time of subdivision approval; therefore, they consider that it would be impossible to make a determination of what buildable areas would be consistent with the regulations and show that on the plat. Furthermore, they state that requiring other relevant easements or limitations regarding lot coverages to be noted on subdivision plats is not feasible, since previously granted easements may or may not be available in the public record because they are not always required to be recorded in land records. They expressed concern that the locality bears the risk of being bound by an error in the delineation of a buildable area on a plat that has been recorded (see 15.2-2307). Thus, they believe that requiring delineation of buildable areas on subdivision plats should not be required. Some, however, commented that they have no objection to placing RPA/RMA boundaries and various other appropriate notes on plats, and some are already doing this.

**Agency Response:** See the brief discussion above regarding plat notations. Further changes are being proposed that focus on key issues and provide broad flexibility otherwise. See the proposed text changes at the end of the comments pertaining to Part VI, below.

**Comments:** Several localities commented that if the Board expects localities to adopt specific standards, then this section should be revised to require adoption of specific standards only after CBLAD, with input from affected stakeholders, has developed appropriate guidance regarding measures to accomplish the general performance criteria. Another locality suggested that if the requirement for incorporation of specific standards is retained, the Board should add language to the effect that specific development standards would have to be incorporated into the subdivision ordinance only if such standards are not already contained in other local ordinances or regulations.

**Agency Response:** Acknowledged. Further changes are being proposed that focus on key issues and provide broad flexibility otherwise. See the proposed text changes at the end of the comments pertaining to Part VI, below.

## 9 VAC 10-20-201.4

*Subdivision Ordinance*

**Comment:** One commenter suggested eliminating this subsection or combining these provisions with 9 VAC 10-20-191.B.

**Agency Response:** Acknowledged. Further changes are being proposed that focus on key issues and provide broad flexibility otherwise. See the proposed text changes at the end of the comments pertaining to Part VI, below.

**Text of Section Part VI (Sections 181-191; 201 is to be deleted) as now recommended for change:**

*PART VI.*
[~~*ZONING AND SUBDIVISION*~~ *LAND DEVELOPMENT*] ORDINANCES.

***9 VAC 10-20-181. Purpose.***

*The purpose of this part is to assist local governments in the* ~~*development*~~ *preparation of* ~~*zoning and subdivision ordinances*~~ *land use and development ordinances and regulations adopted pursuant to § 10.1-2109 et seq. and § 15.2-2200 et seq. of the Code of Virginia that are consistent with the Act and this chapter, and to establish guidelines for determining the consistency of* ~~*zoning and subdivision ordinances*~~ *such ordinances and regulations with the Act and this chapter. Such ordinances and regulations include, but are not limited to, subdivision ordinances and zoning ordinances.*

**~~B.~~ *9 VAC 10-20-191.* ~~Zoning ordinances~~ *Land Development Ordinances, Regulations and Procedures*.**

*A.* Local governments shall review and revise their ~~zoning ordinances~~ *land development regulations*, as necessary, to comply with § 10.1-2109 of the Act. ~~The ordinances~~ *To achieve this: , each local government shall demonstrate and establish, as necessary, a development suitability hierarchy of land uses and performance standards within the local zoning ordinance that (i) protects sensitive environmental features as listed in 9 VAC 10-20-80 and 9 VAC 10-20-90; (ii) ensures that the uses permitted by the local zoning ordinance are consistent with the comprehensive plan, the Act and this chapter; (iii) minimizes the amount of impervious cover and land disturbance; and (iv) preserves existing vegetation and open space to the maximum extent practicable. Each local zoning ordinance should:*

~~1. Make provisions for the protection of the quality of state waters; *by:*~~

~~*a. Incorporating appropriate design considerations that concentrate development in areas without physical constraints to development as identified in the comprehensive plan or that address the appropriate development density in areas with physical constraints to development; and*~~

~~*b. Encouraging compact, efficient development concentrated in the most appropriate portions of the locality as identified in the comprehensive plan, in order to minimize land disturbance and impervious cover and preserve existing vegetation, drainage patterns, and open space.*~~

~~2. Incorporate either explicitly or by direct reference the performance criteria in Part IV; *(9 VAC 10-20-110 et seq.) of this chapter. At a minimum, specific development standards that implement the following performance criteria from subdivisions 1, 2, and 5 of 9 VAC 10-20-120 (minimizing land disturbance and impervious cover and preserving existing vegetation, respectively) shall be included as part of the zoning ordinance.*~~

~~3.~~ ~~Be consistent~~ *Ensure consistency* with the ~~*water quality protection goals, objectives, policies, and implementation strategies identified in the local*~~ comprehensive plan within Chesapeake Bay Preservation Areas.

*1. Local zoning ordinances shall include performance standards that protect sensitive environmental features, as listed in 9 VAC 10-20-80 and 9 VAC 10-20-90, and ensure that the uses permitted by the local zoning regulations are consistent with the Act and this chapter.*

*2. Local land development ordinances and regulations shall incorporate either explicitly or by direct reference the performance criteria in Part IV (9 VAC 10-20-110 et seq.) of this chapter. Specific development standards that implement the performance criteria from subsections 1, 2 and 5 of 9 VAC 10-20-120 (minimizing land disturbance and impervious cover and preserving existing vegetation, respectively) shall be included.*

*3. Local land development ordinances and regulations shall protect the integrity of Chesapeake Bay Preservation Areas by incorporating standards to ensure (i) the protection of water quality; (ii) the preservation of Resource Protection Area land categories, as set forth in 9 VAC 10-20-80, including the 100-foot wide buffer area; and (iii) the compatibility of development with Resource Management Area land categories, as set forth in 9 VAC 10-20-90.*

*4. Local land development ordinances and regulations shall provide for (i) depiction of Resource Protection Area and Resource Management Area boundaries on plats and site plans, including a notation on plats of the requirement to retain an undisturbed and vegetated 100-foot wide buffer area, as specified in subsection 3 of 9 VAC 10-20-130; (ii) a plat notation of the requirement for pump-out and 100 percent reserve drainfield sites for on-site sewage treatment systems, when applicable; and (iii) a plat notation of the permissibility of only water dependent facilities or redevelopment in Resource Protection Areas, including the 100-foot wide buffer area.*

*5. Local governments shall require, during the plan of development review process, the delineation of the buildable areas that are allowed on each lot. The delineation of buildable areas shall be based on the performance criteria specified in Part IV (9 VAC 10-20-110 et seq.) of this chapter, local front and side yard setback requirements, and any other relevant easements or limitations regarding lot coverage.*

~~C. Plan of development review. Local governments shall make provisions as necessary to ensure that any development of land within Chesapeake Bay Preservation Areas must be accomplished through a plan of development procedure pursuant to § 15.1-491(h) of the Code of Virginia to ensure compliance with the Act and this chapter. Any exemptions from those review requirements shall be established and administered in a manner that ensures compliance with these this chapter.~~

*B. Local governments ~~should evaluate the relationship between the submission standards, performance standards, and permitted uses in local land management ordinances to identify any obstacles to achieving the water quality goals of the Act and this chapter. Local governments should revise these ordinances as necessary to eliminate any identified obstacles based in the procedural or development standards.~~ shall undertake the following, as necessary, to comply with § 10.1-2109 of the Act:*

*1. Local governments shall evaluate the relationship between the submission requirements, performance standards, and permitted uses in local land development ordinances and regulations to identify any obstacles to achieving the water quality goals of the Act and this chapter. Local governments shall revise these ordinances and regulations, as necessary, to eliminate any obstacles identified in the submission requirements or development standards.*

*2. Local governments shall review and revise their land development ordinances and regulations adopted pursuant to § 10.1-2109 et seq. and § 15.2-2200 et seq. of the Code of Virginia to assure that their subdivision ordinances, zoning ordinances, and all other components of their local Chesapeake Bay Preservation Act programs are consistent in promoting and achieving the protection of state waters. In addition, local governments shall identify and resolve any conflicts among the components of the local programs and with other local ordinances, regulations and administrative policies, to assure that the intent of the Act and this chapter is fulfilled.*

*3. Local governments shall review and revise their land development ordinances and regulations to ensure consistency with the water quality protection goals, objectives, policies, and implementation strategies identified in the local comprehensive plan.*

**9 VAC 10-20-215.A**

**Comment:** A number of local governments expressed considerable concern that the manual has not been modified in many years, and they questioned whether needed modifications to the manual will be ready for localities to use in satisfying implementation of the revised regulations. They stated that the manual should be prepared before requiring localities to make any local program changes.

**Agency Response:** Acknowledged. CBLAD staff will make needed modifications and provide needed guidance to local governments in time to assist them in complying with the amendments to these regulations.

**9 VAC 10-20-231**

*Local Program Elements*

**Comment:** A commenter recommended that in the second sentence of the opening paragraph, the Board should change the words "may submit" to " shall submit."

**Agency Response:** Actually the permissive word "may" is appropriate here. The intent is to allow localities to submit their proposed revisions ahead of time so staff can screen them for potential problems prior to the local government taking action on them. However, localities are not required to do this; it is merely a form of assistance CBLAD provides.

**Comment:** Some local governments commented that the Board should replace the words "Phases I-III" with "Phases I-II," and that all references to Phase III of the program be deleted from the regulations. Furthermore, in the opening paragraph, the board should define what constitutes a "revision" worthy of review by the board, to end confusion over this issue.

**Agency Response:** The use of the term, "Phase III" is merely a clarification of how the requirements of the Chesapeake Bay Preservation Area Designation and Management Regulations are divided up for review. Phase III refers to the requirement that local governments review and revise their zoning and subdivision ordinances, as necessary to assure that local ordinances and regulations are internally consistent regarding the Bay Act requirements. This is a direct requirement from the Chesapeake Bay Preservation Act and, therefore, cannot be deleted in the regulations.

**9 VAC 10-20-231.1.a**

*Local Program Elements*

**Comment:** One commenter requested that Board to add to the list of features to be identified any tributaries and streambeds filled or otherwise altered by human activity.

**Agency Response:** CBLAD staff perceive this category to fall under "other sensitive environmental resources" and, therefore, recommend that no further changes be made in response to this comment.

**9 VAC 10-20-231.1.d**

*Local Program Elements*

**Comment:** Some commenters stated that reference to the model ordinance should be deleted.

**Agency Response:** Staff is reluctant to recommend this, since many localities used the original model ordinance extensively, and new model ordinance language will be developed to assist localities with revisions needed pursuant to these changes.

**9 VAC 10-20-231.3**

*Local Program Elements*

**Comment:** Some localities stated that this subsection, referring to Phase III of the program, should be deleted. Others stated that this subsection should provide localities with the option adopting a stand-alone ordinance.

**Agency Response:** As noted above, the use of the term, "Phase III" is merely a clarification of how the requirements of the Chesapeake Bay Preservation Area Designation and Management Regulations are divided up for review. Phase III refers to the requirement that local governments review and revise their zoning and subdivision ordinances, as necessary to assure that local ordinances and regulations are internally consistent regarding the Bay Act requirements. This is a direct requirement from the Chesapeake Bay Preservation Act and, therefore, cannot be deleted in the regulations. Furthermore, the Board does not intend to require localities to discontinue stand-alone ordinances. Proposed revisions to subsection 110.D clarify this.

**9 VAC 10-20-231.4**

*Enforcement*

**Comment:** The James City County attorney believes the reference to State Code section 15.2-2209 should be changed to 10.1-2109. Referencing section 15.2-2209 implies that only those jurisdictions that have made the Bay Act program part of their Zoning Ordinances have the ability to levy civil penalties. This appears to be in conflict with the Bay Act itself, which allows civil penalties. Localities that have adopted stand-alone Bay Act ordinances that are not part of their zoning ordinances should not be precluded from using civil penalties to enforce their Bay Act program requirements.

***CBLAD Response***: The Department concurs with these observations and recommends that the references to § 15.2 *et. seq*. and to local zoning authority be removed.

**Text as initially recommended for change**:

*9VAC 10-20-231 Preparation and submission of management program*

*4. Consistent with §§ 10.1-2108, 10.1-2109, and 10.1-2113 of the Act, and to the degree that a local program is adopted pursuant to or as a part of local zoning authority, local governments may use civil penalties, consistent with § 15.2-2209 of the Code of Virginia to enforce compliance with the requirements of local programs.*

**Text as now recommended for change**:

*9VAC 10-20-231 Preparation and submission of management program*

*4. Consistent with §§ 10.1-2108, 10.1-2109, and 10.1-2113 of the Act~~, and to the degree that a local program is adopted pursuant to or as a part of local zoning authority~~, local governments may use civil penalties~~, consistent with § 15.2-2209 of the Code of Virginia~~ to enforce compliance with the requirements of local programs.*

**Comment:** Several commenters stated that they consider application of local civil penalties to agricultural and silvicultural violations to be improper, since those programs are more suitably regulated by State agencies.

**Agency Response:** Since these activities are subject to local ordinances, they are also subject to the associated enforcement procedures and penalties, regardless of what other agencies are involved with them.

## 9 VAC 10-20-250

*Enforcement*

**Comment:** CBF recommended that the Board substantially alter the enforcement provisions, allowing for a more direct and effective process, perceiving past efforts to be inadequate.

**Agency Response:** It is not clear that the agency and Board have more direct enforcement authority. An Attorney General's opinion has been sought, but the opinion has not yet been provided. Therefore, staff recommends that no further changes be made in response to this comment. Furthermore, such changes should not be necessary, since any enforcement authority provided to the Board is derived from the Bay Act, not the regulations.

## 9 VAC 10-20-250.1 and 2

**Comments:** Many localities requested the Board to delete these subsections, pertaining to annual reports (all the added language), or at least made optional. However, a number of commenters supported the concept of CBLAD oversight of local programs and the requirement for localities to submit annual program implementation reports to CBLAD.. They stated that increased monitoring of local government program implementation and performance is necessary in order to ensure proper compliance with the Bay Act and regulations and provide for accountability. However, they noted that if the required reports are to be a "litmus test," the reporting criteria must be specified in the regulations and consistently applied. They recommended that any reporting requirements should be developed in close consultation with local government stakeholders to avoid overly burdensome and duplicative reporting requirements that would offset the benefits of the review.

**Agency Response**: This is the intent of the Department. Such oversight is practically the only way CBLAD can help the Board fulfill its responsibility under the Act to ensure the localities are implementing their programs effectively. We will present your support to the Chesapeake Bay Local Assistance Board.

**9 VAC 10-20-250.1.a**

*Local Program Consistency*

**Comments:** Most urban localities objected to annual Implementation report and compliance reviews as overly burdensome for local staff, and they consider them to be unnecessary, since they believe their annual VPDES permit reports to DEQ to already address the main focus of the Bay Act Program. Some commenters stated that, because the annual implementation report is intended to be mandatory, it would be more accurate to replace the word "request" with "require."
**Agency Response**: The annual reports for VPDES MS4 Permits are not the same reports required by CBLAD, therefore there will be no duplication of efforts. Staff concurs with the word change and will recommend that to the Board.

**9 VAC 10-20-250.1.b**

*Enforcement*

**Comment:** Some localities commented that if reviews are kept in, they should occur on the five-year cycle, consistent with the required local review and update of the comprehensive plan.

**Agency Response**: Even though most localities do not review their comprehensive plans per the five-year provision, the Department concurs with this suggestion and recommends a change to a five-year compliance review program and that additional language be providing making a link to the plan review cycle.